85-918

NO. 85-_____

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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MOTHER GOOSE NURSERY SCHOOLS, INC.,
an Indiana Not-For-Profit Corporation,

Petitioner

-v.-

THEODORE L. SENDAK, Individually and as
Attorney General of the State of Indiana,

Respondent

PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROSALIE B. LEVINSON
JOHN KAPPOS
HAWK P.C. KAUTZ
Chapel Square - Ste. 222
7863 Broadway
Merrillville, IN 46410
Telephone: (219)769-1150

COUNSEL FOR PETITIONER

QUESTION PRESENTED

Should an Attorney General enjoy absolute immunity from §1983 liability for the administrative function he performs in reviewing State contracts?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit, reversing the Trial Court and denying Petitioner relief based on its finding that the Respondent was entitled to absolute immunity is reported at 770 F.2d 668 (7th Cir. 1985). A copy of the decision, entered on August 14, 1985, is attached hereto as Appdenix B, infra at B. 1-16. The Order of the Seventh Circuit denying the Petition for Rehearing and Suggestion of Rehearing En Banc, dated October 1, 1985, is attached hereto as Appendix A, at A. 1-2.

A decision of the United States District Court for the Northern District of Indiana, granting Petitioner's Motion for Summary Judgment, is reported at 502 F.Supp. 1319 (N.D.IND. 1980). A copy of the decision, entered on December 16, 1980, is attached hereto as Appendix C, infra at C. 1-28. The District Court's decision entering

final judgment and awarding the Petitioner damages is reported at 591 F.Supp. 897 (N.D.IND. 1984). The decision, entered on June 29, 1984, is attached hereto as Appendix D, infra, at D. 1-75.

JURISDICTION OF THIS COURT

The Judgment of the United States Court of Appeals for the Seventh Circuit denying the Petition for Rehearing and Suggestion of Rehearing En Banc was entered on October 1, 1985. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

STATUTE INVOLVED

In pertinent part, I.C. 4-13-2-14 reads:

> "All contracts and leases shall be approved as to form and legality by the attorney general. The attorney general or a deputy designated by him shall approve any contract or lease submitted to him under this chapter unless he finds that it does not meet the conditions of this chapter and shall detail in writing to the administrative body or chief executive officer of the agency or department involved the specific respects in which

the proposed agreement fails to meet the requirements of law."

I.C. 4-13-2-14

STATEMENT OF THE CASE

Petitioner -- Plaintiff Below -- had for a number of years entered into yearly contracts with the Indiana Department of Public Welfare for the provision of daycare services and transportation to children participating in the Aid to Families with Dependent Children program. The contract for fiscal year 1979 was rejected by the Attorney General, despite the fact that Petitioner had already, as was the custom, provided services during the summer months to the State based on its anticipation that the contract would again be renewed. The Attorney General never provided any reasons for his refusal, but Petitioner was later told that the Director of the Petitioner's Corporation had to resign due to a conviction for income tax evasion. C-4. Yet even

following resignation of the Director, contract approval was not forthcoming, the Petitioner was not reimbursed for services rendered, nor was it informed of any reason for nonapproval after the resignation. C-5; D-8. The District Court found an actionable claim answerable in damages under the Fourteenth Amendment for the Attorney General's arbitrary refusal to execute this contract. Summary Judgment was granted December 16, 1980, and following a later hearing on damages, the Court, in June of 1984, awarded Petitioner Twenty-eight Thousand Two Hundred Forty-eight Dollars & 75/100 ($28,248.75). D. 74-75.

The trial court proceeded on the assumption that the Attorney General in approving contracts enjoys a "liberal qualified immunity." C-9. Although under Indiana law (I.C. 4-13-2-14), the Attorney General is to determine the form and legality of contracts, the Court reasoned that

this discretion could not be exercised in such a manner as to violate constitutional rights. C-12. Both Judge McNagny who heard the Summary Judgment case as well as Judge Lee who heard the damages issue concluded that Petitioner had a legitimate claim of entitlement as well as a right to a good reputation, which were taken without due process of law. C. 16-28; D. 12-21. Both Judges further held that since the conduct of the Respondent-Defendant violated clearly established rights to minimum due process, it was not shielded by a qualified immunity.

The Seventh Circuit reversed the findings of the District Court based on its conclusion that the Indiana Attorney General when reviewing contracts is acting in a quasi-judicial capacity and thus is entitled to absolute immunity from liability for damages. The court reasoned that an Attorney General exercises a quasi-judicial professional discretion when approving con-

tracts, and since he is called upon to exercise legal expertise he is functioning in a capacity similar to that of a Judge. The Seventh Circuit paid only lip service to the requirements imposed by this Court in Butz v. Economu, 438 U.S. 478 (1978), where it was held that the individual seeking absolute immunity carries a heavy burden of justification.

REASONS FOR GRANTING THE WRIT

The Supreme Court has consistently recognized that government officials performing certain functions should be afforded an absolute immunity for suit. Imbler v. Pachtman, 424 U.S. 409 (1976); Butz v. Economu, 438 U.S. 478 (1978). It is equally clear that the burden is on the official claiming immunity to demonstrate his entitlement. Butz, 438 U.S. at 506; Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982). The Court in Butz established a multi-pronged,

similar to that performed here -- namely assessing the legality of proposed government action.

Despite the enumeration of these factors, the Circuit Courts are totally divided on the question of when executive officials performing so called quasi-judicial functions should be entitled to an absolute immunity. This split in the circuits is apparently what led this Court to grant certiorari in the case of Cleavinger v. Saxner, 727 F.2d 669 (7th Cir. 1984), cert. granted 105 S.Ct. 1166 (1985), to determine whether an absolute as opposed to a qualified immunity should be granted to members of a prison institutional disciplinary committee. Petitioners contend that these recurring questions regarding the level of proof which must be met to justify absolute immunity should be resolved by this Court. In addition, it is the Petitioner's contention that the Seventh Circuit in this case

totally misapplied the Butz factors, and ignored the ruling in Mitchell; and therefore, reversal is required.

I. The Seventh Circuit's decision -- Granting absolute immunity to an Attorney General regarding his review of state contracts -- is contrary to the Supreme Court's decision in Butz v. Economu and Mitchell v. Forsyth.

An examination of the Seventh Circuit's analysis of absolute immunity in this case indicates that the court has ignored the standards set forth in Butz v. Economu, 438 U.S. 478 (1978). Butz first suggests an examination of the historical basis for immunity. Here the Seventh Circuit relied upon cases holding that an Attorney General is historically entitled to absolute immunity when acting in a prosecutorial capacity. B. 8-9. However, when reviewing contracts, the function performed is so different than that involved in prosecuting cases so as to foreclose reliance on this

historical basis. As to functional comparability, the Seventh Circuit found that the approval of contracts as to form and legality is a quasi-judicial function. B-10. The fact, however, that an Attorney General is called upon to interpret law does not lead inexorably to the conclusion that absolute immunity is warranted. In Mitchell v. Forsyth, 105 S.Ct. 2806 (1985) this Court held that the United States Attorney General is entitled to only a qualified immunity in making highly discretionary "legal" decisions in furtherance of the national security. Obviously the United States Attorney General was required to interpret the law in deciding the legality of issuing a wiretap; yet this Court afforded only a qualified immunity for the performance of this function.

A second factor mentioned in Butz, the degree to which the official might be exposed to harassing litigation, was also incorrectly

applied in this case. The Seventh Circuit, to substantiate the risk of litigation, made reference to the fact that numerous contracts are rejected each year by the Attorney General. B-10. The appropriate inquiry, however, is the likelihood that an adverse decision will result in harassing or intimidating litigation, usually because the adjudicatory process excites strong feelings and involves critical fundamental rights, i.e. the deprivation of liberty. The Seventh Circuit noted in its opinion that there had been no legal contest to the Attorney General's power during the first forty (40) years of the statute. B-8. There was no showing that those who contract with the state are prone to file burdensome litigation. Much more significantly, it is only where an Attorney General in denying a contract has acted in such a manner as to violate clearly established constitutional rights that he will have to defend

federal court suits. Harlow v. Fitzgerald, 457 U.S. 800 (1982) requires summary judgment for the official if plaintiff cannot meet this burden, and Mitchell v. Forsyth, 105 S.Ct. at 2817 allows an immediate appeal of an adverse ruling. Thus, denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints.

The greatest error of the Seventh Circuit was in ignoring the final factor in Butz -- whether the procedural safeguards involved in the adjudicatory process are sufficient to prevent constitutional wrongdoing and thus to mitigate the need for a monetary remedy. The opinions in both Butz and Forsyth stress that one core reason for granting absolute immunity is the existence of important safeguards built into the judicial process, such as the isolation of federal judges from political influences, their obligation to follow prece-

dent, the adversarial nature of judicial proceedings, the existence of procedural and evidentiary rules, etc. As the Court noted in Butz, these "safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 438 U.S. at 512. Thus, the Court reasoned that "persons subject to these constraints and performing adjudicatory functions ... are entitled to absolute immunity." 438 at 514. (Emphasis added).

When an Attorney General in Indiana renders advice as to the legality of contracts, none of the safeguards spelled out in Butz and Mitchell are present. The claimant is given no opportunity to present evidence or to contest the Attorney General's position. There are no procedural safeguards to enhance the reliability of the information relied upon.[1] Indeed, the

(Footnote on next page).

whole basis for this suit was the arbitrary capricious manner in which the Attorney General exercised his power, failing to provide notice and refusing to respond to any of the Plaintiff's inquiries as to why the contracts were not approved. Granting absolute immunity to an Attorney General acting in this context fails to adequately protect the claimant's civil rights, contrary to the analysis in Butz. As the court stated in Butz, "the cluster of immunities protecting the various participants in judged supervised trials stems

1. Petitioner is not arguing that procedural due process necessarily requires that the state institute elaborate procedures in reviewing contracts; rather the critical fact is that in this case legitimate property expectations were created on behalf of the Petitioner which the Attorney General blatantly ignored. The question for immunity is whether the safeguards built into the adjudicatory process guard against constitutional violations. The lack of any procedural protections suggests that the attorney general is not retained from exercising his discretion in a manner which violates due process, equal protection, or first amendment rights. As stated in Butz, broad powers present broad opportunities for abuse. Butz, 438 U.S. at 505-06.

from the characteristics of the judicial process ..." 438 U.S. at 511. Where none of the protective features of the judicial process are present, as in the case of an Attorney General approving contracts under Indiana law, there is a much greater danger of arbitrary, biased decision making and, thus, little justification for an award of absolute immunity. The Supreme Court in Mitchell v. Forsyth similarly reasoned that where built in restraints on the Attorney General's activities were not present -- in that case making legal decisions as to what was necessary in the name of national security -- absolute immunity had to be rejected. A contrary result would leave civil rights litigants without a federal remedy even where the Attorney General's decision is improperly motivated by race discrimination or sex discrimination or where contract denial is in violation of free speech rights

or other clearly established constitutional freedoms. Petitioner's core argument is that decision making made in the context where no procedural safeguards are afforded should not trigger an absolute immunity defense.

This Court in both Butz and Harlow also stated that grants of absolute immunity are appropriate only when the defendant official establishes that public policy so requires. Harlow, 457 U.S. at 808; Butz, 438 U.S. at 506. The Seventh Circuit made no effort to explain why public policy requires absolute immunity where an Attorney General reviews state contracts. In Mitchell v. Forsyth the United States Attorney General was called upon to make highly discretionary decisions determining the legality of certain conduct, namely issuance of a wire tap to gather intelligence in the interest of national security. Nonetheless, the Supreme Court refused to allow the

United States Attorney General an absolute immunity in this context. Certainly there are monumentally weaker public policy arguments in this case for affording an absolute immunity to an Attorney General who is simply making decisions as to the form and legality of state contracts.

In short, in this context where none of the safeguards of the judicial process are present to protect the claimant's civil rights, where there is no showing that an Attorney General would be subject to a deluge of frivolous suits, where there is no historical support for the grant of absolute immunity, and where no public policy reasons canjustify the grant of absolute immunity, the Seventh Circuit's conclusion should be held to be in clear violation of the precedent established by this Court.

II. The Seventh Circuit decision and its analysis of absolute immunity is contrary to that of numerous

decisions both in the Seventh Circuit as well as in other Circuits.

Despite the enumeration of factors in Butz, the Circuits are very much divided as to when government officials should be afforded an absolute immunity. In dealing with this same issue, i.e. an attorney acting in an advisory capacity, a few courts have held that government officials should be entitled only to a qualified immunity because the function performed cannot be viewed as an integral part of the judicial process. As explained in Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970), "... the purpose of according judicial immunity is to protect the integrity of judicial process." Id. at 743. Donovan involved legal decisions rendered by the City Attorney. Similarly in Shifrin v. Wilson, 412 F.Supp. 1282, 1303-4 (DDC 1976) the court ruled that only a qualified immunity should be afforded municipal corporation counsel for its legal

advice regarding the validity of a regulation later found to violate plaintiff's civil rights. See also Benson v. Scott, 734 F.2d 1181 (7th Cir. 1984) (applying, without discussion only a qualified immunity to the state attorney general who was called upon to interpret Illinois law as to the availability of state-provided representation.)

In general, courts which have refused to extend absolute immunity have often times focused on the lack of procedural constraints discussed in the previous section. Indeed the Seventh Circuit in other opinions has specifically refused to afford absolute immunity where the adjudicatory process did not contain procedural safeguards. Cleavinger v. Saxner, 727 F.2d 669 (7th Cir. 1984), cert. granted 105 S.Ct. 1166 (1985); Redding v. Fairman, 717 F.2d 1105, 1117 (7th Cir. 1983), cert. denied, 104 S.Ct. 1282; Chavis v. Rowe, 643 F.2d

1281, 1288 (7th Cir.), cert. denied, 454 U.S. 907 (1981), and Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980). Taking a similar restrictive approach to the grant of absolute immunity, the Sixth Circuit held in Sihad v. O'Brien, 645 F.2d 556, 561 (6th Cir. 1981) that members of an institutional disciplinary committee are not "in one of those exceptional circumstances where it is demonstrated that absolute immunity is essential for the conduct of the public business." (citing Butz v. Economu, 438 U.S. at 507.) Similarly in Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983), the court reasoned that the functions performed by an Internal Revenue Service official were not subject to the safeguards of formal adjudication, thus requiring denial of an absolute quasi-judicial immunity.

Other courts have been much more willing to grant absolute immunity to government officials performing "quasi-judicial functions." Thus, for example, the Fourth Circuit in Ward v. Johnson, 690 F.2d 1098, 1105-1108 (4th Cir. 1982) (en banc) held, contrary to the Seventh and Sixth Circuits, that members of a prison disciplinary committee are entitled to an absolute immunity. Accord: Segarra v. McDade, 706 F.2d 1301, 1306 (4th Cir. 1983). More directly on point, the Sixth Circuit in Campbell v. Patterson, 724 F.2d 41 (6th Cir. 1983) held that absolute immunity should be afforded for the issuance of opinions by the Attorney General. In many cases, quasi-judicial immunity is afforded without careful analysis of the Butz factors. See eg. Stanley v. Indiana Civil Rights Comm'n, 557 F.Supp. 330 (ND.IND. 1983) (The Court lists procedural safeguards without inquiring whether the procedures are adequate in practice);

Stanislaus Food Prods. v. Public Util. Comm'n, 560 F.Supp. 114 (ND. Cal. 1982) (applying quasi-judicial immunity to approval of a utility rate hike without clarifying whether the approval took the form of a hearing); Rosenthal v. State of Nevada, 514 F.Supp. 907 (D.Nev. 1981) (the court simply presumes that the possibility of harassment suits justifies absolute immunity); Morrow v. Bassman, 515 F.Supp. 587 (S.D. Ohio 1981) (the court allows quasi-judicial immunity without identifying or applying any of the elements of the Butz test).

This wholesale expansion of absolute immunity is contrary to the Supreme Court's frequent statements that it will apply absolute immunity only when necessary to preserve those functions in which there is an overwhelming public interest. It also violates the basic principle that absolute immunity be afforded only where the procedural safeguards built into the adjudica-

tory process already mitigate the risk of unconstitutional deprivations. This proliferation of absolute immunity is in stark contrast to the Supreme Court's reluctance to afford absolute immunity even to high ranking presidential aides and cabinet officers. Mitchell v. Forsyth, 105 S.Ct. 2806 (1985); Fitzgerald v. Harlow, 457 U.S. 800 (1982); Butz c. Economu, 438 U.S. 478 (1978). It is especially unwarranted in light of the Supreme Court's recent holding in Harlow v. Fitzgerald, 457 U.S. 800 (1982),, requiring a plaintiff to demonstrate that the alleged official misconduct violated clearly established constitutional rights in order to withstand a motion for summary judgment on the qualified immunity defense as well as the holding in Mitchell v. Forsyth, 105 S.Ct. 2806, 2817, permitting an immediate appeal of a denial of qualified immunity. Government officials thus are accorded ample protection against harass-

ment by the enlarged safeguards of qualified immunity. This again suggests the error of a wholesale expansion of absolute immunity and the need for Supreme Court intervention to clarify when a quasi-judicial immunity is warranted.

CONCLUSION

The Seventh Circuit's decision in this case is contrary to the Supreme Court's rulings in Butz v. Economu, 438 U.S. 478 (1978) and Mitchell v. Forsyth, 105 S.Ct. 2806 (1985). In addition, it raises an issue which has generated conflicting opinions in the Circuits and which thus requires Supreme Court intervention.

Petitioner requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and to summarily reverse the Seventh Circuit's decision, or to hold it in abeyance pending the outcome of Cleavinger v.

Saxner, 727 F.2d 669 (7th Cir.) cert. granted 105 S.Ct. 1166 (1985),[2] or to set this case for plenary review.

DATED: November 22, 1985.

Respectfully submitted,

Rosalie B. Levinson

ROSALIE B. LEVINSON
Chapel Square - Suite 222
7863 Broadway
Merrillville, IN 46410
Telephone: (219)769-1150

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2. It should be noted, however, that this case presents an even stronger argument for the denial of absolute immunity that Cleavinger, where the question involves the adequacy of the procedures afforded by the prison disciplinary committee. The key point here is that the decision making process shares none of the attributes of a judicial hearing.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 1, 1985

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. WILLIAM P. GRAY, District Judge*

MOTHER GOOSE NURSERY SCHOOLS, INC., an Indiana Not-for-Profit Corporation, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Indiana
NO. 84-2318 and 84-2921	NO. 78 C
vs.	
THEODORE L. SENDAK, Individually and as Attorney General of the State of Indiana, Defendant-Appellant)	William C. Lee, Judge

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all

of the judges on the original panel have voted to deny the petition for rehearing and suggestion of rehearing en banc. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion of rehearing en banc be and same is hereby DENIED

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* Honorable William P. Gray, Senior District Judge for the Central District of California, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-2318 and 84-2921

MOTHER GOOSE NURSERY SCHOOLS, INC., an Indiana Not-For-Profit Corporation,

Plaintiff-Appellee,

v.

THEODORE L. SENDAK, Individually and as Attorney General of the State of Indiana,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 78 C—William C. Lee, *Judge.*

ARGUED APRIL 23, 1985—DECIDED AUGUST 14, 1985

Before BAUER and COFFEY, *Circuit Judges*, and GRAY, *Senior District Judge.**

BAUER, *Circuit Judge.* Mother Goose Nursery Schools, Inc. (Mother Goose), an Indiana Not-for-Profit Corporation sued the then Attorney General of Indiana, Theodore L. Sendak,[1] under 42 U.S.C. § 1983 seeking damages

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* Honorable William P. Gray, Senior District Judge for the Central District of California, is sitting by designation.

[1] The record does not disclose whether Theodore Sendak has any relationship to Maurice Sendak, a popular author of children's literature. We thus think it appropriate at this point to relieve the anxieties of any reader of this case (whose caption could be appropriately abbreviated to *Mother Goose v. Sendak*) who may think that this case is about fairy tales and make-believe; it is not.

for Sendak's refusal to approve a proposed contract for child care services between Mother Goose and the Indiana State Department of Public Welfare. The district court granted the plaintiff's motion for summary judgment on December 16, 1980. *Mother Goose Nursery Schools, Inc. v. Sendak*, 502 F. Supp. 1319 (N.D. Ind. 1980). The Court found Sendak personally liable for violating Mother Goose's constitutional rights but deferred a decision on damages so that the court could take evidence on that issue. On June 29, 1984, the district court issued the final judgment awarding Mother Goose $28,248.75. *Mother Goose Nursery Schools, Inc. v. Sendak*, 591 F. Supp. 897 (N.D. Ind. 1984). On July 31, 1984, Mother Goose filed its motion for fees and costs with the district court. On October 23, 1984, the court awarded Mother Goose $13,352.00 for attorney fees and $401.39 for costs.[1] We reverse the judgments of the district court on the grounds that the Attorney General in this case is absolutely immune from liability for damages under Section 1983.

I

Mother Goose has been licensed as a day care nursery in Indiana since 1954. Beginning in November 1975, Mother Goose entered into three yearly contracts with the Indiana Department of Public Welfare for the provision of day care services and transportation to children of parents participating in the Aid to Families with Dependent Children program. 42 U.S.C. ch. 7, subch. IV, pt. A. The last of these contracts expired on June 30, 1978. At this time another proposed contract between plaintiff and the Indiana State Department of Public Welfare for the period from July 1, 1978, to June 30, 1979, was submitted to Sendak, as the Indiana Attorney General, for approval.

[1] The district court's first order in this case was issued by Judge Phil McNagny, who died before the damages issues were decided. Consequently the case was assigned to Judge William Lee who issued the decision on damages and on attorney fees.

This dispute arose when Sendak refused to approve the 1978 contract between Mother Goose and the Department. On September 26, 1978, Sendak wrote a letter to the Governor of Indiana in which he stated that he refused to approve the contract because Anthony Cifaldi, President, Administrator, and a director of Mother Goose, had twice been convicted of making false statements on his income tax returns. Mother Goose filed suit in the district court on November 21, 1978, under 42 U.S.C. § 1983, alleging that Sendak's refusal to approve the contract was without sufficient legal reason and thereby deprived him of his property without due process of law.

Several Indiana statutes and regulations are directly at issue in this case. First and most critically, "[a]ll contracts and leases [to which the State is party] shall be approved as to form and legality by the attorney general," IND. CODE 4-13-2-14, and "[n]o contract with a state agency is legally binding until such approval has been secured." *Citizen Energy Coaltion of Indiana, Inc. v. Sendak*, 459 F. Supp. 248, 256 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979). At the time of the Attorney General's rejection of the Mother Goose contract, the Department of Public Welfare had issued a regulation pursuant to its rule-making authority, IND. CODE 12-1-2-3, which provided in part that

> (a) Each member of the staff [of an approved provider] shall be a competent and reliable person of good moral character and reputation who is mentally, physically and emotionally able to assume assigned responsibility for group care of children, or for the operation and maintenance of the child-care institution.

IND. ADMIN. CODE (17-3-2-12)-B8 (currently codified at 470 IND. ADMIN. CODE 3-4-11 (1984)).

The district court, on Mother Goose's motion for summary judgment, ruled that the Attorney General knowingly acted "beyond the scope of his statutory authority and outside of the law in not accepting the

contract [in that] '[h]e has a mandatory duty to approve all contracts which are lawful as to form and content.'" 502 F. Supp. at 1323. The court reasoned that the Attorney General had admitted in his deposition that he could find no facial defect in the contract, and that his only consideration in disapproving the contract was Cifaldi's prior tax conviction, which Sendak considered rendered Cifaldi lacking good moral character under Section (17-3-2-12)-B8 of the Administrative Code. *Id.* at 1321. The district court held that the Attorney General's knowledge that he was acting outside the scope of his duties removed any claim to qualified immunity that he may have had under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and awarded Mother Goose compensatory damages of $28,248.75. 591 F. Supp. at 909. The district court also held that the action against the Attorney General was not barred by the Eleventh Amendment.

On appeal, Sendak claims that the district court committed four errors when it found him personally liable to Mother Goose: (1) that the district court erred in imposing personal liability on Sendak for allegedly misinterpreting his authority as Attorney General under an unconstrued state statute; (2) that the court erred in rejecting his defense of immunity; (3) that the Attorney General was entitled to immunity under the Eleventh Amendment; and (4) that the Mother Goose's claim was not actionable under 42 U.S.C. § 1983.

II

Sendak's first and third arguments raise essentially the same claim that Sendak, acting in his official capacity as the Attorney General of Indiana, cannot be held personally liable for his actions and that consequently this action is barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign State." However much these fairly simple words remain the subject of continuing debate, *see, e.g., Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142 (1985), one construction of the amendment is clear: "the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *Schueur v. Rhodes*, 416 U.S. 232, 237 (1974). Sendak, therefore, can be held personally liable for his actions as Attorney General, provided that no other bar to liability exists.

III

We thus turn to Sendak's claims of immunity from prosecution under Section 1983. He claims first that he is entitled to absolute immunity from liability under Section 1983 because his actions under Ind. Code 4-13-2-14 rejecting Mother Goose's proposed contract are quasi-judicial in nature, *Citizens Energy Coalition v. Sendak*, 594 F. 2d at 1162, and therefore entitled to absolute immunity. *Butz v. Economou*. 438 U.S. 478, 513 (1978). In the alternative, he argues that he is at least entitled to qualified immunity for his action. Having thoroughly examined the facts of this case, we believe that the nature of the actions which Ind. Code 4-13-2-14 requires the Attorney General to take entitles him to absolute immunity from damages under Section 1983.

Immunities recognized at the common law stem from the recognition that public officials require some form of protection from suits for damages "to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). There are two kinds of immunity: qualified and absolute. The general rule with regard to immunities is that high government officials whose duties entail complex discretionary responsibilities are entitled only to a qualified immunity. *Id.* at 807. Absolute

immunity, however, has been recognized "[f]or officials whose special functions or constitutional status requires complete protection from suit." *Id. See also Mitchell v. Forsythe*, 105 S. Ct. 2806, 2813-14 (1985). "An absolute immunity defeats the suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). Qualified immunity, while also an immunity from suit, arises from the facts of the particular case and is granted to government officials performing discretionary functions and whose "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Thus we recognize that legislators in their legislative functions, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), judges in their judicial functions, *Stump v. Sparkman*, 433 U.S. 349 (1978), prosecutors in their prosecutorial functions, *Imbler v. Pachtman*, 424 U.S. 409, and executive officials engaged in adjudicative functions, *Butz v. Economou*, 438 U.S. 478, are entitled to absolute immunity. In light of these decisions, we reaffirm our conclusion in *Citizens Energy* that the Indiana Attorney General, when reviewing contracts pursuant to Ind. Code 4-13-2-14, is acting in a quasi-judicial capacity and therefore entitled to absolute immunity from liability for damages.

In each case where a government official has claimed that he is entitled to absolute immunity, we rely not upon that official's position in government, but on an examination of the nature of the functions he was performing in the case. *Butz*, 438 U.S. at 508. Three factors must be considered. First, we examine the historical or common-law basis for the immunity in question. *Id.* Second, we examine whether the functions which the official performs subject him to the same obvious risks of entanglement in vexatious litigation as is characteristic of the judicial process. *Id.* at 512. With this second factor we consider the possibility that losers will bring suit against the decision-makers in an effort to relitigate the underlying

conflict and "charg[e] the participants in the first with unconstitutional animus." *Id.* And third, we consider whether the official is subject to checks upon abuses of authority, such as the correction of error on appeal. *Id.*

In *Citizens Energy*, 594 F.2d 1158, we affirmed a district court's construction of Ind. Code 4-13-2-14. The district court in *Citizens Energy* had to construe the authority of the Indiana Attorney General under Ind. Code 4-13-2-14. Although the statute had been enacted for nearly forty years prior to the *Citizens Energy* case, no Indiana Court had ever ruled on the meaning of the statute. The district court concluded that "[t]he Attorney General exercises a quasi-judicial professional discretion when approving contracts pursuant to Ind. Code 4-13-2-14." But, the court went on to hold that "in determining whether to approve or disapprove state contracts, the Attorney General may only consider the legality and form of the proposed contract . . . [and] has no discretion to reject a contract which is lawful as to form and content." 459 F. Supp. at 257. Because the Attorney General was exercising a quasi-judicial discretion, however, monetary damages could not be assessed against the Attorney General, but he could be enjoined from further unlawful conduct. *Id.* at 258. On appeal, this court affirmed the district court and specifically reiterated the district court's conclusion that Ind. Code 4-13-2-14 requires the Attorney General to exercise a quasi-judicial professional discretion when approving contracts.[5]

[5] Our decision in *Citizens Energy* should have been enough for the district court in this case to dismiss the action against the Sendak, but it was not. Judge McNagny, after quoting this court's language that the provison requires the exercise of a quasi-judidical discretion and therefore entitles the Attorney General to immunity, stated: "This Court cannot agree with this statement." 502 F. Supp. at 1323. While we recognize that our analysis in *Citizens Energy* was brief, *Citizens Energy* is binding precedent upon the district court in this case and should have been dispositive of the issue before us. Notwithstanding the

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The district court in *Citizens Energy* issued a preliminary injunction against the Indiana Attorney General to prevent him from implementing his determination, made pursuant to the authority granted him by Ind. Code 4-13-2-14 to review contracts, that a proposed contract between Citizens Energy and the Public Counselor of Indiana was illegal. The Attorney Genral determined that because Citizens Energy maintained a paid lobbyist on its staff, Citizens Energy's role as a grant recipient from the state would essentially make the organization, and consequently its lobbyist, a public official. The Attorney General thus concluded that the proposed contract was illegal under Ind. Code 2-4-3-7, which prohibits lobbying for pay by public officials. The district court held that the Attorney General could not construe the statute to deny the proposed contract with Citizens Energy in such a way as to deprive them of their rights to petition the government under the first and fourteenth amendments. Such a restriction, the court reasoned, could not be upheld unless the state could show the existence of a compelling state interest. The court thus concluded that the Attorney General's construction of the Indiana anti-lobbying statute was not supported by a compelling state interest and issued a preliminary injunction.

With regard to the first factor of the *Butz* analysis, the historical basis for the immunity, we could find no cases which discussed the role of the Attorney General when performing functions comparable to the functions at issue here. We must also recognize that the Indiana Attorney General receives his powers and duties from statutes alone and holds no common law powers. *State* ex rel. *Steers v. Criminal Court of Lake County*, 232 Ind. 443, 112 N.E.2d 445 (Ind. 1953). But, where the office is created by statute and "did not exist through most of the

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[1] *continued*

district court's analysis in this case to the contrary, no cases decided since our decision in *Citizens Energy* give us cause to question the continued validity of the rationale behind that decision.

development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure." *Nixon v. Fitzgerald*, 457 U.S. 731, 738 (1982). There are, for example, a plethora of cases discussing the immunity accorded to an attorney general when acting in a prosecutorial capacity and when administering the criminal laws. These cases are in agreement that the Attorney General should be shielded by an absolute immunity in such contexts. *See, e.g., Dellums v. Powell*, 660 F.2d 802 (D.C. Cir. 1981); *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *Scolnick v. Lefkowitz*, 329 F.2d 716 (2d Cir.), *cert. denied*, 379 U.S. 825 (1964); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S 503 (1927); *Suitor v. Nugent*, 199 A.2d 722 (R.I. 1964). We think that these cases provide an adequate historical basis for granting the Indiana Attorney General absolute immunity in this case.

There are, of course, some obvious differences between the role of the Attorney General as prosecutor and the Indiana Attorney General's role in reviewing proposed contracts with the state for correct "form and legality." But the similarities between the two are sufficient to make them analogous for immunity purposes. In both instances the state has vested the Attorney General with the responsibility to review the facts of a given case—in one, allegedly criminal conduct, and in the other, a proposed contractual relationship—and determine whether the conduct is legal. Both decisions require that the Attorney General use his legal expertise and practical experience to determine whether the proposed conduct is in accordance with the law. In fact, in the contract review area, the Attorney General's conduct is even more "judicial" than in the Attorney General's role as prosecutor. As prosecutor, he is vested with broad discretion to bring a suit, which discretion is seldom questioned by the court, especially if the Attorney General decides not to pursue the case further. Moreover, as a prosecutor, the Attorney General

in a sense is merely initiating the formal judicial process. In his role as contract reviewer, he has no discretion in determining what cases are considered formally, much as a judge has little control over which cases are prosecuted. Moreover, rather than starting the prosecution, the Attorney General is vested with the "ultimate" decision on legality.

In *Butz*, the Supreme Court was faced with the issue of the immunity, if any, which should be afforded to the Chief Hearing Examiner, Judicial Officer, and prosecuting attorney for the Department of Agriculture who issued and reviewed an administrative action against a commodities futures commission merchant. In determining that these administrative officials were to receive absolute immunity, the Supreme Court reviewed the historical rationale for the absolute immunity for judges, and concluded that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities," 438 U.S. at 511, and "from the characteristics of the judicial process." *Id.* at 512.

The Court next considered the special nature of the hearing examiner and the ALJ's responsibilities. The Court determined that these officials must be free to "perform their respective functions without harassment or intimidation." *Id.* Just as the judicial process contains many safeguards which place checks on malicious actions by judges—"[t]he insulation of the judge from political influence, the importance of precedent is in resolving controversies, the adversary nature of the process, and the correctability of error on appeal" *id.*— the adjudicatory process in federal administrative agencies was given immunity because the framework within which the hearing examiner and administrative law judge work is functionally comparable to the judge.

Similarly, in this case, the Attorney General is vested by the state with a special power to review contracts, subject to certain checks which limit the chances of arbitrary or malicious actions in the contract review process.

Mother Goose argues that because of the seemingly narrow construction which this court placed on Ind. Code 4-13-2-14 in *Citizens Energy*, the role of the Attorney General is more in the nature of an administrator than in the nature of a judge. It is true that in *Citizens Energy* we did hold that the statute which requires the Attorney General to approve all contracts which are correct as to "form and legality" allows him no discretion to disapprove those which are correct. But to state that it follows from this holding that the Attorney General's action in reviewing a contract is in a sense ministerial, ignores the very nature of the act which the Attorney General must perform. While a determination as to the correct "form" of the contract may be a simple task, the Attorney General's responsibility to determine the legality of contracts which state agencies wish to enter can hardly be a simple ministerial duty. One must examine more than the face of a contract to determine that it is not an illegal contract under State law.[4]

In this case, the Attorney General had the right, indeed the responsibility, to look beyond the mere words of the proposed contract. Just because the parties had had three previous contracts which were approved does not mean that the contract here had to be approved. It was certainly the prerogative of the Attorney General in this case to make the determination that because Cifaldi had twice been convicted of making false statements on his tax returns that he was not a "staff member" of "good moral character."[5]

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[4] Questions regarding the "legality" of actions are those which are the everyday "work" of lawyers and judges. Thus for example, this court is called upon here to consider the "legality" of the Attorney General's actions. It can hardly be said that our task is the "ministerial" responsibility of applying intricate decisions under Section 1983 to the facts of this case.

[5] But the correctness of that determination by the Attorney General is not at issue here because we find that Sendak cannot be subject to an award of retrospective damages under Section

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The risk of vexatious litigation is also obvious in this case. As of September 30, 1984, the contracts section of the Indiana Attorney General's office had reviewed 6,609 documents for the calendar year. The Attorney General rejected 276 of those documents. It is inconceivable that we should open the Attorney General up to suit from nearly 300 rejected contractors a year. Such an opportunity for intimidation and harassment would inevitably diminish the impartiality of the Attorney General in reviewing proposed state contracts. *See Butz*, 438 U.S. at 516.

Finally, the Attorney General is subject to checks upon abuses of his authority. *Butz*, 438 U.S. at 512. The process by which the Attorney General must approve contracts has similar "characteristics of the judicial process." The statute provides that all proposed contracts must be approved by the Attorney General, and no contract is valid without his approval. *Citizens Energy*, 459 F. Supp. at 256. In making that determination, he must interpret Indiana statutory and case law to determine that the proposed contract does not violate any laws. Second, the Indiana General Assembly has provided checks upon the Attorney General. Indiana provides for actions in the form of mandamus. *See* IND. CODE 34-1-58-1. IND. CODE 34-1-58-2 provides:

> The action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer or person to compel the performance of any act which the law specifically enjoins, or any duty resulting from any office, trust or station.

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[1] *continued*

1983. If relief of another sort not barred by immunity concerns, such as an injunction, were at issue here, we would be required to examined the legality of the contract more closely, as we did in *Citizens Energy*. But although the complaint had initially sought injunctive relief, the district court did not award it and Mother Goose has not cross-appealed on the denial of the injunction.

The Indiana Supreme Court has held that "[t]he trial courts of this state clearly have the power to issue writs of prohibition and mandamus to administrative agencies in appropriate cases, such as where constitutional due process rights are being denied," *State* ex rel. *Pickard v. Superior Court*, 447 N.E. 2d 584 (Ind. 1983). And this Court has recently noted that Indiana also provides extensive declaratory relief in its state courts to individuals wishing to test the scope and legality of state laws and municipal ordinances. *See Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). Moreover, to the extent that Mother Goose asserts that its rights are contractual, Indiana law provides a relief mechanism of which Mother Goose has not yet availed itself. IND. CODE 34-4-16-1 provides:

> Any person or persons having or claiming to have a money demand against the state of Indiana, arising, at law or in equity, out of contract, express or implied, accruing within fifteen (15) years from the time of the commencment of this action, may bring suit against the state therefore in the superior court of Marion County, Indiana, by filing a complaint with the clerk of the said court and procuring a summons to be issued by said clerk, which summons shall be served upon the attorney-general of Indiana thirty (30) days before the return day of the summons.

The review procedures provide adequate checks upon abuse by the Attorney General to confirm our conclusion that when reviewing proposed contracts for the state, the Indiana Attorney General is performing a quasi-judicial function and his conduct thereunder is entitled to absolute immunity from prosecution for damages under Section 1983.[9]

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[9] It is true, of course, that the General Assembly has not required that the Attorney General provide any hearing to the agenvy or the private contractor as part of the contract approval process. It may be that due process requires some sort of pre-deprivation hearing, *see, e.g., Fuentes v. Shevin*, 407 U.S. 67

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As we established in *Citizens Energy*, the Attorney General's discretion is limited in the reasons for which he can reject a proposed contract. "The Attorney General has no discretion to reject a contract which is lawful as to form and context." 594 F.2d at 1162. Because "he is not a party to the contact," *id.*, he cannot reject those which he considers "bad" as a matter of public policy or which he thinks the state is "unwise" to enter. That is not within his authority. His role is limited to considering whether the contract is "bad" as a matter of law, insofar as it complies with state and federal law as he interprets it. There is no question in this case that Sendak rejected the contract for "legal" reasons.

Therefore the district court's decision holding Sendak personally liable for rejecting Mother Goose's contract must be reversed.

IV

Because the district court found Sendak liable for damages under Section 1983, it also awarded Mother Goose attorney fees as authorized in 42 U.S.C. § 1988. This award must obviously be vacated in light of our holding that Sendak is immune from liability. In his appeal challenging the award of attorney fees, Sendak also asks us to overrule our decision in *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980). We decline to do so.

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(1972), but that issue is not now before us. Mother Goose has chosen not to appeal the district court determination that injunctive relief would not be appropriate, which appeal would have given us jurisdiction to consider that broader constitutional issue. Similarly, we have no occasion here to consider whether the post-approval proceeding afford adequate protections under the due process clause. *See, e.g., Parratt v. Taylor*, 451 U.S. 527 (1981). Our only conclusion is that for the purposes of our review of the immunities issue, the Attorney General's contract approval process is quasi-judicial in nature.

In *Terket* we were asked to review a district court's decision to award attorney fees to the prevailing party under Section 1988 after the non-prevailing party had filed its notice of appeal in the underlying Section 1983 action. We held that

> district courts in this circuit should proceed with attorney's fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits.

623 F.2d at 34.

We find Sendak's arguments that this procedure does not serve judicial economy unpersuasive. It is true that it is necessary for the non-prevailing party to file two appeals where the fees award is made separate from the underlying action. But it is not true that the losing party is "forced into the ludicrous position of appealing fee awards they might otherwise choose not to challenge" in order not to be faced with a fee award against it if the underlying action is reversed. Appellant's br. in No. 84-2921 at 5.

It is only necessary under *Terket* for the losing party to make a timely appeal of an award under Section 1983 if that party has some basis for challenging the award or he challenges substantive aspects of the fee. If the only reason for challenging the award is to preserve his rights in case this court reverses the Section 1983 decision, Rule 60(b), FED. R. CIV. PROC., provides an appropriate remedy. Rule 60(b) provides in part that

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [when]:
>
> ***
>
> (5) . . . a prior judgment upon which it it is based has been reversed or otherwise vacated . . . .

We recognize, of course, that our review of trial court decisions under Rule 60(b) is for an abuse of discretion. *McKnight v. United States Steel Corp*, 726 F.2d 333, 335, (7th Cir. 1984). But, if the underlying action has been reversed, vacated or otherwise modified by this court, it would be an abuse of discretion for the trial court to leave a Section 1988 attorney fee award intact, if the Rule 60(b) motion was made within a reasonable time after our reversal of the underlying Section 1983 action.

Concerns for judicial economy warrant the continued use of the *Terket* rule. The compelling reasons for the rule are to permit fee determinations to be made while the relevant factors of the Section 1983 action are fresh in the trial judge's mind and to prevent duplicative litigation. Judicial economy is best served by the consolidation of appeals from the Section 1983 action with the related attorney fee questions. Under the *Terket* rule both the trial court and this court are each given the opportunity to consider both claims at roughly the same time.

The judgments of the district court are reversed with directions to vacate the award of damages and attorney fees and to dismiss the suit.

SO ORDERED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 80234—Pandick Midwest, Inc., Chicago—8-14-85—450

MOTHER GOOSE NURSERY SCHOOLS INC., an Indiana Not-for-Profit Corporation, Plaintiff,

v.

Theodore L. SENDAK, Individually and as Attorney General of the State of Indiana, Defendant.

Civ. No. H 78-449.

United States District Court
N. D. Indiana,
Hammond Division.

Dec. 16, 1980.

MEMORANDUM DECISION

McNAGNY, District Judge.

This matter comes before the Court on defendant's motion for summary judgment and plaintiff's cross motion for summary judgment.

On or about June 30, 1978 a contract was submitted to the defendant, serving in his capacity as Attorney General of the State of Indiana, for consideration. This contract concerned an agreement between the plaintiff and the Indiana State Department of Public Welfare whereby the plaintiff

would provide transportation and day care services to children of public assistance recipients and other low income persons in the State of Indiana for the period from July 1, 1978 to June 30, 1979. In return the Indiana Department of Public Welfare, in cooperation with the Federal Government, would reimburse the plaintiff for providing such services. All contracts entered into by state agencies such as the Indiana Department of Public Welfare must be approved by the attorney general pursuant to Ind. Code 4-13-2-14 which reads, "All contracts and leases shall be approved as to form and legality by the attorney-general. A copy of every such contract or lease extending for a term longer than one (1) year shall be filed with the director of public works and supply (department of administration)." Following the submission of the contract to the defendant pursuant to Ind. Code 4-13-2-14, the defendant rejected the contract.

This case comes before this Court on an action for declaratory judgment, injunctive relief and for damages against the Attorney General for arbitrarily refusing to approve the contract as to its form and legality all in violation of Title 42 U.S.C. §1983. This Court took jurisdiction based upon Title 28 U.S.C. § § 1331 and 1343.

Findings of Fact

The plaintiff, Mother Goose Nursery School, has been annually licensed as a day nursery from 1954 until October 23, 1975 when pursuant to the Indiana Not-for-Profit Corporation Act of 1971, they were issued a Certificate of Incorporation by the Secretary of State of Indiana. The plaintiff is now and has been since its incorporation in good standing under the laws of the State of Indiana. Since October 23, 1975, the plaintiff has annually been licensed as a day care nursery.

After its incorporation in 1975, the

plaintiff entered into contracts with various agencies of the State of Indiana. During this period Anthony Cifaldi was a director of the plaintiff corporation and retained such position until he resigned on October 1, 1978, as a result of a letter he received from the Administrator of the Indiana Department of Public Welfare, Wayne Stanton. This letter requested that he remove himself as administrator and also that he remove himself from the Board of Directors of the plaintiff corporation.

These events came about as a result of the defendant's rejection of the contract submitted to him for approval as to form and legality, and as a result of a letter written by the defendant to the Governor of Indiana on September 26, 1978. This letter informed the Governor that the defendant disapproved the contract because Anthony Cifaldi had received a sentence in the United States District Court in 1972

for filing and subscribing to false income tax returns. The letter additionally noted that Cifaldi had been found guilty on November 10, 1977 for swearing to and verifying a false and fraudulent statement of his tax return in 1966. At the time of the contract's disapproval, Cifaldi was on probation.

Following the resignation of Anthony Cifaldi, the Board of Directors of plaintiff corporation advised the Administrator of the Department of Public Welfare and the defendant that Cifaldi's resignation had been accepted by the Board. Subsequent to this time the contract was never approved nor was the plaintiff informed of any reasons for non-approval after Cifaldi's requested resignation.

Conclusions of Law

In order to sustain a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the parties must show that there is no genuine issue as to

any material fact and that they are entitled to judgment as a matter of law.

In this case the facts are virtually undisputed by the parties. Therefore, the issues confronting this Court are whether the defendant can withstand this claim based on executive immunity, and additionally, if no such immunity is found to exist, did the defendant have the power or the authority to reject a contract submitted to him that was proper in form.[1]

(1) "For purposes of establishing jurisdiction under 28 U.S.C. §1343(3), it is irrelevant whether or not a public official is acting in accordance with state law, so long as said person, acting under color of state law, has arguably deprived another person of rights secured by the Federal Constitution." Citizens Energy Coalition

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1. The defendant admits in his deposition that he could find no defect in the contract and that his only consideration in disapproving the contract was Cifaldi's prior violations of the law.

of Indiana, Inc. v. Sendak, 459 F.Supp. 248, 256 (S.D.Ind. 1978). Here there is no question that the defendant was acting under his authority as Attorney General and thus under color of state law.

Traditionally, higher officials are entitled to immunity from liability under the Eleventh Amendment to the United States Constitution. Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). However, in recent years the Supreme Court has narrowed the scope of immunity privilege, holding that although officials charged with tortious acts under state law may still be allowed an absolute immunity if the acts complained of are outside their authority, those charged with unconstitutional acts are entitled only to a qualified immunity. "(I)t has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under

color of state law." Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974) (emphasis added).

(2,3) Although it is now clear that absolute immunity is no longer a bar to suit when a constitutional violation has occurred, a qualified immunity for officials remains. The usual standard in assessing the immunity of officers is their good faith and probable cause in acting as they did. See Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d. 288 (1967). The extent of such immunity depends on varying circumstances. In Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d. 90 (1974), the Supreme Court enumerated these circumstances in a suit brought against the governor of Ohio. "In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices -- whether the formulation

of policy, of legislation, of budgets, or of day-to-day decision -- is virtually infinite." Id. at 246, 94 S.Ct. at 169. As a result, the Court grants higher officials a wider latitude of discretion in their decisions. "In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." Id. at 247, 94 S.Ct. at 1692.

(4,5) The Defendant in this case is a principal subordinate as discussed in the above-quoted language. Therefore, it is readily apparent to this Court that he should be granted a liberal qualified immunity. The degree of liberality afforded a higher official is further discussed in Scheuer.

These considerations suggest that, in varying scope, a qualified immunity is

available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct. Mr. Justice Holmes spoke of this, stating:

> 'No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain

> of a ship. But even in that case a great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event.' Moyer v. Peabody, 212 U.S. 78, 85 (29 S.Ct. 235, 236, 53 L.Ed. 410) (1909). (Citations omitted.)

Id. at 247-248, 94 S.Ct. at 1692. Thus, it appears that if the defendant in this case had a good faith belief that he was acting properly, which this Court believes the defendant possessed, then he should be granted immunity. However, in Butz v. Economu, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court further defined what the reasonable grounds and a good faith belief entails.

> We consider here, as we did in Scheuer, the need to protect officials who are required to exercise their discretion and the related public in-

terest in encouraging the vigorous exercise of official authority. Yet Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law. (Emphasis added.)

Id. at 506, 98 S.Ct. at 2911. See also Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Although Butz dealt with the immunity of federal officials, this standard is equally applicable to state officials who have violated constitutional rights. "The principle should prove as workabe in suits against federal officials as it has in the context of suits against state officials." Id. at 507, 98 S.Ct. at 2911.

(6) Therefore, even though this Court determines that the Attorney General was acting in good faith when he decided to disapprove the contract, it must further

be determined whether he should have known that he was acting outside the law. Such a determination has been considered by the Honorable Judge Steckler, Chief Judge of the Southern District of Indiana and by the United States Court of Appeals for the Seventh Circuit. In Citizens Energy Coalition of Indiana, Inc. v. Sendak, 594 F.2d 1158 (7th Cir. 1979), the Seventh Circuit approved the following statement by Judge Steckler:

> The Attorney General exercises a quasi-judicial professional discretion when approving contracts pursuant to Ind. Code 4-13-2-14. However, in determining whether to approve or disapprove state contracts, the Attorney General may only consider the legality and form of the proposed contract. The Attorney General has a mandatory duty to approve all contracts which are lawful as to form and content. The

> Attorney General has no discretion to reject a contract which is unlawful as to form and content; he is not a party to the contract.

I.d at 1162.

(7) Thus, the Attorney General acted beyond the scope of his statutory authority and outside of the law in not accepting the contract in issue and should have realized that he was doing so. In fact, the defendant in this case had no authority to exercise his discretion in the first place. "He has a mandatory duty to approve all contracts which are lawful as to form and content." Id.

It should be noted that in Citizens Energy Coalition of Indiana v. Sendak, 459 F.Supp. 248, 258 (S.D.Ind. 1978), the court stated that, "The Attorney General, acting in his quasi-judicial capacity, is immune from liability for monetary damages. However, this immunity does not extend to

injunctive relief." This Court cannot agree with this statement. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971). "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." Butz v. Economu, 438 U.S. 478, 505, 98 S.Ct. 2910 (1978). Injunctive relief would afford little remedy to the injured parties in this case. The harm took place more than two years ago. "Injunctive or declaratory relief is useless to a person who has already been injured." Id. at 504, 98 S.Ct. at 2910. "But 'it is... well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion,

federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U.S. (678) at 684 (66 S.Ct. 773 at 777, 90 L.Ed. 939)." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 396, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971); Davis V. Passmann, 442 U.S. 228, 99 S.Ct. 2264, 2276, 60 L.Ed.2d 846 (1979).

The appropriate means of redressing a wrong will vary as the circumstances dictate.

> (D)amages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. Myers v. Anderson, 238 U.S. 368 (35 S.Ct. 932, 59 L.Ed.2d 1349) (1915). See generally Monroe v. Pape, 365 U.S. 167 (81 S.Ct. 473, 5 L.Ed2d 492) (1961); Moor v. County of Alameda, 411 U.S. 693 (93 S.Ct. 1785, 36 L.Ed.2d 596)

(1973). In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another.

Scheuer v. Rhodes, 416 U.S. 232, 238, 94 S. Ct. 1683, 1687, 40 L.Ed.2d 90 (1974).

In Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the Supreme Court reiterated its position on the impact of a violation of Section 1983 and the ramifications of an award of damages for such a violation.

> Indeed, a decisionmaker would be derelict in his duties, if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages....'Whatever other concerns should shape a particular official's actions, certainly one of them should

be the constitutional rights of individuals who will be affected by his actions. To critize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to critize one of the statute's raisons d'etre.'

Id. 100 S.Ct. at 1418. Accordingly, if liability is found under Section 1983, then damages can be awarded in this case.

(8,9) In order to find liability under 42 U.S.C. §1983, there must be a deprivation of a right, privilege, or immunity secured by the Constitution. Therefore, it must be determined whether Sendak violated one of the plaintiff's Constitutional rights before liability can be imposed in this case. In this instance the plaintiff was denied the right to perform under a contract that was entered into for the performance of services. The plaintiff, a valid corporation in good standing, entered

into the contract with an agency of the State of Indiana. As a corporation, the plaintiff has all the rights and privileges afforded a person and can sue for deprivation of rights secured by the Constitution and laws. Des Vergnes v. Seekonk Water District, 601 F.2d 9 (1st Cir. 1979); Advocates for Arts v. Thompson, 532 F.2d 792 (1st Cir. 1976); Pennsylvania Bank and Trust Co. v. Hanisek, 426 F.Supp. 410 (W.D.Pa. 1977).

(10) In denying the plaintiff's right to contract, the defendant denied the plaintiff one of its rights protected by the Fourteenth Amendment. The Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), attached a broad meaning to the words "liberty" and "property" in the Due Process Clause of the Fourteenth Amendment when it stated:

While this Court has not attempted to

> define with exactness the liberty... guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, ... In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. (Emphasis added.)

Id. at 572, 92 S.Ct. at 2706.

In Roth, the Supreme Court found that a contractual interest was a significant property interest which should be protected by procedural due process. The Supreme Court stated that "(W)hen protected interests are implicated, the right to some kind of a prior hearing is tantamount." Id. at 569-70, 92 S.Ct. at 2705. Thus,

certain contractual interests are afforded the protection of procedural due process.

(11) It is felt that the contract in this case should be afforded such protection. It has already been determined that the defendant exceeded his authority in disapproving the contract. Additionally, the contract was complete and valid on its face. In fact, such contracts had been entered into between the parties in prior years. The plaintiff in this case had a sufficient interest in the contract to at least be afforded some kind of explanation for its disapproval and also thereafter to be afforded at least a minimal opportunity to confront and refute the charges. This is true especially in light of the knowledge that the defendant had no power to exercise any discretion in approving or disapproving the contract. The plaintiff was provided nithing. It was not officially informed of why the contract was disapproved nor was

it given the opportunity to be heard. The plaintiff might well have assumed that the contract was not approved because of its form. But even if this was the case, it still would not have been provided an opportunity to contest this matter.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligi-

bility. But we held that they had a right to a hearing at which they might attempt to do so. (Emphasis added.)

Id. at 577, 92 S.Ct. at 2709. The Supreme Court further defined when procedural due process should be afforded a party in the companion case to Roth, Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 723 (1972), where the court stated:

> '(P)roperty' interests subject to procedural due process protection are not limited by a few rigid, techinical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'....A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id. at 601, 92 S.Ct. at 2699.

The plaintiff in this case had a legitimate expectation that the contract would be approved. The contract was proper in form and content, and similar contracts had been approved in the past. All the details had been worked out between the parties to the contract. The Attorney General was not a party to the contract and had no authority to contest the contract on the grounds that he thought the plaintiff should not be licensed to provide day care services. This job belonged to another agency of the state. The plaintiff had a legitimate claim of entitlement under Indiana statutes that the contract be approved summarily.[2] The plain-

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2. Additionally, under Ind. Code §25-1-1.1-1, "A license or certificate of registration that an individual is required by law to hold to engage in a business, profession, or occupation may not be denied, revoked or suspended because the applicant or holder has been convicted of an offense. The acts from which his conviction resulted may, however, be considered as to whether the applicant should be entrusted to serve the public in a specific capacity." In Indiana State Board of Registration and Education v.

tiff was denied this claim without any opportunity to contest the matter.

Lastly, the plaintiff's good name as a reputable day care center was in jeopardy. Newscasts broadcast on the radio and articles published in the newspaper ran stories which speculated as to the reasons for the nonapproval of the contract. "(Where a person's good name, reputation, honor, or integrity is at stake because of what the

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2. Cummings, 68 Ind.Dec. 444, 387 N.E.2d 491, 495 (1979), the court stated that it is only if the acts leading to the convictions have a direct bearing on an applicant's present fitness to be licensed that they may be the basis for a denial of a license. So even if the Attorney General did have a right to reexamine the validity of the plaintiff's license, which he did not, he must at least make some sort of showing that Cifaldi was not presently fit to be licensed. The incident for which Cifaldi was convicted took place more than ten years prior to the defendant's consideration of the contract and there was no inquiry to determine the acts upon which the convictions were based. Also, the defendant made no attempt to differentiate or distinguish Cifaldi from that of the plaintiff corporation. The party to the contract was a corporation acting through its directors and shareholders, but the defendant disregarded this fact and treated the corporation as the alter ego of Anthony Cifaldi.

government is doing to him, notice and an opportunity to be heard are essential.... In such a case, due process would accord an opportunity to refute the charge." Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972).

(12) The plaintiff's right to contract and due process rights were violated by the defendant in this case. As a result of these violations the plaintiff has been forced to suffer harm which can only be remedied by remuneration.

Based on the aforementioned considerations, this Court now finds that the defendant, Theodore Sendak, is liable to the plaintiff for a violation of its Constitutional rights.

It is therefore ORDERED that the motion of the defendant for summary judgment be and hereby is DENIED. It is FURTHER ORDERED that the cross motion of the plaintiff for summary judgment be and hereby is

GRANTED.

Since this Court has heard no evidence as to damages in this matter, the parties will be given twenty-one (21) days in which to file briefs on this point, whereupon the matter will be set for a hearing on the issue of damages only.

MOTHER GOOSE NURSERY SCHOOLS
INC., an Indiana Not-for-Profit
Corporation, Plaintiff,

v.

Theodore L. SENDAK, Individually and
as Attorney General of the State of
Indiana, Defendant.

Civ. No. H 78-449.

United States District Court
N. D. Indiana,
Hammond Division.

June 29, 1984.

MEMORANDUM JUDGMENT
AND ORDER

LEE, District Judge.

(1) "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The

matter before the court is one such controversy which has raged over a deprivation of a property right allegedly in violation of the Due Process Clause of the Fourteenth Amendment.

In the context of cross-motions for summary judgment, the Honorable Phil M. McNagny, Jr., then a judge of this court, determined the issue of liability in this case in favor of the plaintiff and against the defendant in an order dated December 16, 1980. Mother Goose Nursery Schools, Inc. v. Sendak, 502 F.Supp. 1319 (N.D. Ind. 1980). At the conclusion of the order, Judge McNagny noted that the court had heard no evidence on damages and therefore ordered the parties to submit briefs on the issue and further indicated that, upon full briefing, the matter would be set for a hearing on the issue of damages. The parties duly filed the requested briefs, but Judge McNagny's illness prevented the

court from setting the promised hearing and precluded the court from assessing damages at the anticipated time.

A damage hearing was eventually held by the undersigned. At the conclusion of the hearing this court ordered the parties to submit post-hearing briefs. These briefs have been received and accordingly the court is in a position to determine the amount of damages to be awarded to plaintiff in this action. Prior to the assessment of damages, however, the court will address certain arguments relating to liability raised again by the defendant, through his brief and arguments, in the damage phase of this case. The court further feels compelled to raise, sua sponte, an issue only touched upon, if at all, in Judge McNagny's order, which has received much attention recently. That issue relates to whether or not a deprivation within the meaning of the Due Process Clause of the Fourteenth Amendment occurred so that

the complaint states a justiciable cause of action under 42 U.S.C. §1983.

I.

Because it has a bearing upon the ultimate disposition of this case, a review of the background underlying this controversy is necessary.

The plaintiff, Mother Goose Nursery Schools (hereinafter Mother Goose) is a not-for-profit organization[1] incorporated in the State of Indiana and has been licensed as a day care nursery from 1954 to the present. The defendant, Theodore L. Sendak,

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1. Indiana has a Not-for-Profit Corporation Act which is codified at I.C. 23-7-1.1-1, et seq. The Act allows for reasonable compensation to the members of the corporation as follows:

> (c) No corporation shall, by any implication or construction possess the power of engaging in any activities for the purpose of or resulting in the pecuniary remuneration to its members as such, but this provision shall not prohibit reasonable compensation to members for services actually rendered; nor shall the corporation be prohibited from engaging in any undertaking for profit so long as such undertaking does not inure to the profit of its members.

I.C. 23-7-1.1-4 (1980) (emphasis added).

is the former Attorney General of the State of Indiana.

A dispute arose between these parties in September of 1978 when Sendak, then the Attorney General of Indiana, refused to approve as to "form and legality" a contract between plaintiff and the Indiana State Department of Public Welfare. Such refusal, Judge McNagny ruled, violated plaintiff's constitutional rights and consequently rendered defendant liable under 42 U.S.C. §1983.[2]

The events leading to the ruling by this court were based upon the following scenario. Beginning in November of 1975,

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2. In pertinent part, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jursidiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Mother Goose entered into three yearly contracts[3] with the Indiana Department of Public Welfare for the provision of day care services and transportation to children of families participating in the Aid to Families with Dependent Children (AFDC) program. (Title XX). The last of these contracts expired on June 30, 1978. At that time another proposed contract between plaintiff and the Indiana State Department of Public Welfare for the period from July 1, 1978, to June 30, 1979 was submitted to defendant for his approval. Under Indiana law, all contracts entered into by public agencies such as the State Department of Public Welfare must be approved by the Attorney General "as to form and legality." Ind.

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3. The contracts for the years 1973, 1975 and 1977 were attached as exhibits to plaintiff's Motion for Summary Judgment of March 14, 1980 (Record, at 27, Exhibits 37-39). Those contracts were all "approved" by defendant Sendak.

Code § 4-13-2-14.[4] Defendant did not take any action on this matter until September 26, 1978 when he wrote a letter to the Governor of Indiana stating that he refused to approve the subject contract because Mr. Anthony Cifaldi, President and Director of Mother Goose, was twice convicted of making false statements on his income tax returns.[5]

On October 1, 1978, after receipt of a letter from the Administrator of the Indiana

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4. In pertinent part, the statute reads:

> All contracts and leases shall be approved as to form and legality by the attorney general. The attorney general or a deputy designated by him shall approve any contract or lease submitted to him under this chapter unless he finds that it does not meet the conditions of this chapter and shall detail in writing to the administrative body or chief executive officer of the agency or department involved the specific respects in which the proposed agreement fails to meet the requirements of law.

I.C. 4-13-2-14 (emphasis added).

5. It appears that Mr. Cifaldi was convicted of income tax evasion in federal court in 1972. The same facts provided the foundation for a state court conviction in 1977.

Department of Public Welfare requesting that he resign from his position with Mother Goose, Cifaldi tendered his resignation. The Board of Directors of plaintiff corporation advised the Administrator that they had accepted Cifaldi's resignation. In spite of this information, the contract was never approved, nor was plaintiff informed of any reason for his refusal after Cifaldi's resignation.

On November 21, 1978, plaintiff filed its complaint in this court. In the order dated December 16, 1980, Judge McNagny found defendant's refusal of the subject contract to be outside of the scope of his authority and contrary to law. Judge McNagny was further of the view that this unlawful act deprived plaintiff of its constitutional right to contract and that defendant's failure to hold a hearing and give plaintiff an opportunity to confront the charges violated plaintiff's constitutional right

to procedural due process. The court found that, because defendant was acting outside the law,[6] he was not entitled to immunity and therefore, damages would be a proper remedy under 42 U.S.C. §1983.

II

Before discussing the arguments about liability raised by the defendant in his post-hearing brief the court will address, sua sponte, the United States Supreme Court decision in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). At least two reasons exist for analyzing Parratt. First, that undeniably was a landmark decision addressing the process due for a deprivation of a property right under the Fourteenth Amendment within the context of a section 1983 action. Since Judge McNagny ruled that plaintiff was

6. See, e.g. Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

deprived of a property interest without being afforded due process, and since Judge McNagny did not have the benefit of Parratt, a review of that case and its rapidly escalating progeny seems appropriate. Second, because of the Parratt decision, some doubt was cast upon the continued validity of Judge McNagny's ruling by the United States Court of Appeals for the Seventh Circuit decision in Flower Cah Co. v. Petitte, 685 F.2d 192 (7th Cir. 1982). There, Judge Posner, on a petition for rehearing wrote:

> When the motion to stay the preliminary injunction was filed with this court, the appellees, in opposing the motion, did not cite a single case in support of their position. In their motion to vacate they have overcorrected this omission by citing a large number of cases. One, Mother Goose Nursery Schools v. Sendak, 520 F.Supp. 1319 (N.D.Ind. 1980, though distin-

> guishable on its facts, supports their petition. But since it is a district court decision, rendered before Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (the principal basis of our opinion in this case), it is not substantial authority in their favor.

Id. at 195. Thus, this court concludes that Judge McNagny's order should be reassessed in light of Parratt. If the doctrine espoused in Parratt precludes plaintiff's claimed deprivation of a property right under section 1983, plaintiff's prayer for damages must, as a consequence, fail because of the lack of a cognizable federal claim.

In Parratt, a Nebraska prison inmate ordered a $23.50 hobby kit through the mails. The hobby kit was lost after it reached the prison. The inmate filed a §1983 suit against the Warden and "hobby manager" of

the prison alleging that they were negligent in allowing the hobby kit, contrary to prison policies, to be signed for and delivered to persons other than the inmate who ordered it. The district court held that by negligently failing to follow their own regulations, the prison officials had deprived the inmate of his property without due process of law. On this basis, the district court granted plaintiff's motion for summary judgment and this decision was affirmed by the Eighth Circuit Court of Appeals, 620 F.2d 307 (8th Cir. 1980). On review, the Supreme Court reversed and dismissed the inmate's complaint, 451 U.S. at 544, 101 S.Ct at 1917. In doing so, the Supreme Court analyzed two troublesome areas in section 1983 litigation: the state of mind requirement of the actors and the exhaustion of remedies. After determining that section 1983 covers ngeligent as well as intentional deprivations

and that exhaustion of remedies is not generally a prerequisite to suit in federal court under that statute, the Supreme Court in Parratt indicated that analysis of a claim under section 1983 must focus upon whether or not the essential elements of a cause of action under that state exists:

> Accordingly, in any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complaint of was committed by a person acting under color of state law; and (2) whether thsi conduct deprived a person of rights, privileges, or immunities secured by the Constitution of the United States.

451 U.S. at 535, 101 S.Ct. at 1913.

(2) In this case, the first element set forth in Parratt clearly exists. There can be no doubt but that the activities of defendant constituted action "under

color of state law." Even defendant does not dispute that the deprivation of which plaintiff complains was pursuant to a decision made by one, here the Attorney General of Indiana, clothed with the authority of the state. Nor could such a dispute be seriously made for it is a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law", that constitutes "action taken 'under color of state law.'" United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); accord Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

The second element for a cause of action under section 1983 as set forth in Parratt also exists in this case though its existence is not as clear. As indicated, the Supreme Court in Parratt stated that in order for a cause of action to lie under



section 1983, it must be shown, aside from the fact that the action was under color of state law, that the activity complained of deprived a person of a right, liberty, privilege or immunity secured by the constitution or laws of the United States. 451 U.S. at 535, 101 S.Ct. at 1913. The Court in Parratt further noted that where, as here, the party is seeking to establish a due process claim under the Fourteenth Amendment in order to satisfy the second element, the claimant must show: (1) the existence of a property right; (2) that the alleged loss of that property amounted to a deprivation; and (3) that the deprivation of the property right occurred "without due process of law." Id. at 536-37, 101 S.Ct. at 1913-14, quoting Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

(3,4) "Property rights, of course, are not created by the Constitution." Board

of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlements to such benefits." Id. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit ...". Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L. Ed.2d 570 (1972). Thus, to have a property interest in a benefit, a person "must... have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577, 92 S.Ct. at 2709.

Unquestionably, defendant's action in this case deprived plaintiff of a property

right. As the above quotations point out, "the standard the Court has developed is one of 'cause', if the plaintiff can assert that he has a 'legitimate claim of entitlement' not to lose a valuable governmental benefit except for cause, the the plaintiff has asserted a 'property' interest." Begg v. Moffitt, 555 F.Supp. 1344, 1348 (N.D.Ill. 1983). Plaintiff's legitimate expectation of a benefit was explained by Judge McNagny in his order on liability thusly:

> The plaintiff in this case had a legitimate expectation that the contract would be approved. The contract was proper in form and content, and similar contracts had been approved in the past. All the details had been worked out between the parties to the contract. The Attorney General was not a party to the contract and had no authority to contest the contract on

> the grounds that he thought the plaintiff should not be licensed to provide day care services. This job belonged to another agency of the state. The plaintiff had a legitimate claim of entitlement under Indiana statutes that the contract be approved summarily. The plaintiff was denied this claim without any opportunity to contest the matter.

502 F.Supp. at 1325.

Thus far, the analysis has not proved troublesome. It is clear that plaintiff was deprived of a property interest to which it had a legitimate entitlement by one acting "under color of state law." There remains, however, the question of whether that deprivation was without due process of law.

(5) "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful

manner." Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L. Ed.2d 62 (1965). And in this vein, the Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." Eldridge, supra 424 U.S. at 333, 96 S.Ct. at 902 (emphasis added); see also Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

It is the notion that one may not finally be deprived of a property interest without due process of law which lies at the core of the Supreme Court decision in Parratt. Recognizing that the Constitution requires that a hearing be provided before a claimaint is finally deprived of a protected interest the Court held that the inmate whose hobby kit was lost could expect full redress in a post-deprivation

hearing for such a hearing would provide a "meaningful opportunity" to regain the property or its equivalent. 451 U.S. at 540-41, 544, 101 S.Ct. at 1915-16, 1917, see, e.g., Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.23 406 (1974).

But the post-deprivation hearing found to be consonant with due process in Parratt is not to be accorded a doctrinaire application. The majority opinion in Parratt recognized as much in reviewing its prior holdings on the issue. The Court wrote that in most cases where it had held that due process required a hearing, "the deprivation of property was pursuant to some established procedure and 'process' could be offered before any actual deprivation took place." Parratt, 451 U.S. at 537, 101 S.Ct. at 1914; see, e.g., Mullane, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. The Court further stated, however, that in certain circumstances, a post-deprivation

could provide due process:

> (We) recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the intitial taking, satisfy the requirements of procedural due process.

451 U.S. at 539, 101 S.Ct. at 1915 (footnote omitted). Since the deprivation suffered by Taylor in not receiving the hobby kit was not the result of some established state procedure, but, instead, occurred because of the guard's failure to follow established state procedure, a post-deprivation hearing in the form of a state court action satisfied the Due Process Clause of the Fourteenth Amendment.

(6) The import of Parratt then may be

said to be that a distinction exists between random activities by state officials to follow established procedures on the other hand. In the former case, a post-deprivation hearing, even in the form of a state tort remedy, suffices, while in the latter case, only a pre-deprivation hearing would satisfy the Due Process Clause of the Fourteenth Amendment. Indeed, the oft-cited concurring opinion of Justice Blackmun in Parratt suggests that the distinction is exactly what the majority had in mind:

> Most importantly, I do not understand the Court to suggest that the provision of "post-deprivation remedies," ante (101 S.Ct.), at 1914, within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of

negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," ante, at 1916, it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional acts of its officials, it should be required, as a matter of due process, to do so. See Sniadach v. Family Finance Corp., 395 U.S. 337. 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, (1972); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting harm would violate the Due Process Clause. The mere availability of a subsequent tort

> remedy before tribunals of the same authority that, though its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks.

Id. at 545-6, 101 S.Ct. at 1918 (Blackmun, J., concurring). And, the post-Parratt decision of the Supreme Court in Logan v. Zimmerman Brush, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), indicates that the distinction is not without a difference.

In Logan, plaintiff filed a charge of employment discrimination with the Illinois Fair Employment Practice Commission. Due to negligence on its part, the Commission failed to covene a factfinding conference within one hundred twenty days as required by law. Logan's claim was dismissed and the Illinois Supreme Court affirmed the dismissal finding that the failure to hold the conference within the one hundred twenty

day period deprived the Commission of jurisdiction. On certiorari to the United States Supreme Court, the company argued that since Logan could receive due process in the form of a state hearing, his due process claim was barred by the holding in Parratt. The Supreme Court rejected that reading of Parratt:

> This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with "a tortious loss of ... property as a result of a random and unauthorized act by a state employee ... not a result of some established state procedure." 451 U.S.,at 541, 101 S.Ct., at 1915. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference -- whether the Commission's action

is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id. at 545, 101 S.Ct., at 1918 (second concurring opinion). Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according his proper procedural safeguards.

In any event, the Court's decisions suggest that, absent "the necessity of quick action by the State or the impracticality of providing any predeprivation process," a postdeprivation hearing here would be constitutionally inadequate. Parratt, 451 U.S., at 539, 101 S.Ct., at 1915.

102 S.Ct. at 1153.

The distinction between "random and unauthorized activity" and "failure to

follow established state procedure" leads directly back to the reason for discussing Parratt in the context of this case. It also leads, at least apparently, to the basis for Judge Posner's distinction of Judge MaNagny's ruling on liability in Flower Cab, supra. If defendant Sendak's activity is deemed to be merely a random and unauthorized activity on his part, then a post-deprivation tort remedy (or perhaps mandamus action) would satisfy due process. If, however, defendant's action amounted to a failure to follow established state procedure, a pre-deprivation hearing would be necessary.

(7,8) "What then is the significance of the distinction drawn in Parratt and Logan between 'random and unauthorized' conduct and conduct pursuant to 'an established state procedure'?" Begg, 555 F.Supp. at 1360. In response to this rhetorical question, Judge Prentice H. Marshall, in a lucid

opinion, wrote:

> To answer this question, we think it essential to examine the context in which the Parratt Court adverted to the random and unauthorized nature of the conduct at issue there. The Court observed that when conduct is random and unauthorized, it is impracticable to provide any type of notice and hearing prior to the conduct.
>
> The justifications which we have found sufficient to uphold taking of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a resutl of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the

> State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the States. Indeed, in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation.

Parratt, 451 U.S. at 541, 101 S.Ct. at 1915 (emphasis supplied).

The Court concluded that Parratt was a case with no "contention that it was practicable for the state to provide a predeprivation hearing." Id. at 543, 101 S.Ct. at 1916. Since the only claim Taylor had forwarded

> was the right to a predeprivation hearing it was inevitable that the Court would conclude that since that state could not have provided a predeprivation hearing, due process, not requiring the impossible, would be satisfied by a postdeprivation hearing in the Nebraska state courts.

Id. (footnote omitted). This court is in accord with the foregoing analysis being of the view that the requirement for a predeprivation hearing is, in essence, one of practicality. In those situations where a pre-deprivation hearing is impractical, either because of exigency or because of impossibility, it is incongruous to require that a state afford a hearing under the guise of the Fourteenth Amendment. That amendment only requires that a person receive due process of law and, the process due, of necessity, varies with the facts of each case. After all, "'(d)ue process', unlike

some legal rules, is not a techinical conception with a fixted conten. unrelated to time, place and circumstances," Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961), but rather "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

(9) Clearly, defendant's activity in this case was not the result of some random unauthorized action, but was the result of defendant's willful failure to follow established state procedure. True, defendant's activity was unauthorized in the sense that he did not follow the statutory requirement just as the Illinois Fair Employment Practices Commission in Logan failed to conduct a factfinding conference within one hundred twenty days as required by law. But defendant Sendak knew full and well that his

authority to reject the contract was confined to its "form and legality." His sole function was to review the contract and pass upon its facial validity. No authority existed to look behind the contract to the applicant's background particularly, where as here, the applicant was a corporation and not the alter ego of Anthony Cifaldi. That a pre-deprivation hearing could and should have occurred is undeniable.

As the recitation of facts makes clear, the contract languished in Sendak's office for many months. After defendant saw fit to reject the contract, albeit on impermissible grounds, by writing a letter to the Governor, Anthony Cifaldi resigned as director of plaintiff corporation as a result of a letter he received from the Administrator of the Indiana Department of Public Welfare. Yet during this entire episode plaintiff corporation was never informed of the reasons for rejection -- for all it

knew, the contract may have been rejected on the grounds that it did not meet the requirement of form and legality. Even after Cifaldi tendered the requested resignation, the contract was not approved nor was plaintiff informed of any reason for non-approval. In this respect, "the state has failed to provide due process precisely because the only remedy available has come after the deprivation has occurred." Begg, supra, at 1362. "By failing to provide the requisite predeprivation hearing, the state official (here defendant Sendak) has deprived the plaintiff of a constitutionally protected interest without due process of law and the four elements of a § 1983 due process action described in Parratt are complete." Id.

So what then of the United States Court of Appeals' decision in Flower Cab? The answer is unclear. While Judge Posner wrote that Mother Goose v. Sendak was not

substantial authority because of the fact that it was a district court decision which preceded Parratt, Flower Cab was before the court on a motion to stay an injunction. True, the court noted that it was a "doubtful proposition that every failure -- even every deliberate refusal -- of state or city officials to comply with ministerial duties gives rise to a claim under the constitution" and that the "case probably comes within the principle of Parratt v. Taylor ...". 685 F.2d at 193. But the discussion relating to Parratt was mere surplusage: "(i)t goes without saying that all of our legal and evidentiary observations are tentative, based as they are on the very incomplete record before us on this motion for a stay and the short time that we have had to act on the motion." Flower Cab, supra at 194. In fact, at least one subsequent decision of the United States Court of Appeals for the Seventh Circuit

recognized the tentative nature of Flower Cab and in doing so reiterated the distinction, recognized in Parratt, between "random and unauthorized acts" and those "resulting from established state procedure." Evans v. City of Chicago, 689 F.2d 1286, 1298 (7th Cir. '982).

The court recognizes, as the foregoing is intended to make clear, that the law with respect to procedural due process claims brought under 42 U.S.C. §1983 is in a state of flux. Notwithstanding the uncertainty in this area, the court is convinced that plaintiff's claims allege a cause of action under the Civil Rights Act of 1871 which is not precluded by the United States Supreme Court's decision in Parratt v. Taylor.

III

Having concluded that Parratt does not bar plaintiff's claim, there remains the question of the amount of damage to be as-

sessed in this case. Prior to reaching that issue, however, the court need address the arguments on liability raised by the defendant in both his damage brief and during the damage hearing.

Despite this court's December 16, 1980 ruling that damages would be appropriate, defendant, in its January 7, 1981 brief on damages, contends that monetary damages are not appropriate for several reasons. In this vein, defendant raises absolute and qualified immunity as a defense to damages. These claims, however, were addressed and rejected in the December 16, 1980 ruling (of which more will be said below). Alternatively, defendant claims that an award of damages would violate the Eleventh Amendment. This claim, whil implicitly but not specifically addressed in Judge McNagny's ruling, is nonetheless without merit. After briefly commenting upon the immunity claim, this court will address defendant's

Eleventh Amendment claim.

In rejecting the immunity claims, Judge McNagny wrote:

> It should be noted that in Citizens Energy Coalition of Indiana v. Sendak, 459 F.Supp. 248, 258 (S.D.Ind. 1978), the court stated that, "The Attorney General, acting in his quasi-judicial capacity, is immune from liability for monetary damages. However, this immunity does not extend to injunctive relief." This Court cannot agree with this statement. "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 395 (91 S.Ct. 1999, 2004, 29 L.Ed.2d 619) (1971). "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating

constitutional guarantees." Butz v. Economu, 438 U.S. 478, 505 (98 S.Ct. 2894, 2910, 57 L.Ed.2d 895) (1978). Injunctive relief would afford little remedy to the injured parties in this case. The harm took place more than two years ago. "Injunctive or declaratory relief is useless to a person who has already been injured." Id. at 504 (98 S.Ct. at 2910).

Mother Goose Nursery Schools, Inc. v. Theodore Sendak, 502 F.Supp. at 1323. The foregoing decision with respect to immunity was written at a time when the state of the law with respect to qualified immunity permitted the court to consider both an objective and subjective aspect with respect to the executive official's conduct. The objective element invoked a presumption that an official would have knowledge of and respect for "basis, unquestioned

constitutional rights." Wood v. Strickland, 420 U.S. 308, 320, 95 S.Ct. 992, 999, 43 L.Ed.2d 214 (1975), while the subjective component referred to "permissible intentions," id. whereby taken together, a claimed qualified immunity would be defeated if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the (plaintiff), or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury ...". Id. at 321-22, 95 S.Ct. at 1000-01.

I was within the jurisprudential framework that Judge McNagny penned his December 16, 1980 decision. But that framework was subsequently altered by the United States Supreme Court decision in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

In Harlow, the United States Supreme

Court revamped its prior decisions relating to qualified immunity by holding that such a claim (the affirmative defense that it is, see Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980)), could be sustained solely upon a showing of objective good faith because "(t)he subjective element of the good faith defense frequently has proved incompatible with our admonition in Butz (v. Economu, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)) that insubstantial claims should not proceed to trial." Harlow, 457 U.S. at 817, 102 S.Ct. at 2737.

Since subjective good faith was generally a question for the jury, see, e.g. Landrum v Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977), and jury questions by definition are not susceptible to resolution in a summary fashion (as per Fed.R.Ci.P. 56), many claims, otherwise un-

warranted, necessitated a complete trial. And since the avowed purpose of qualified immunity is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," Harlow, 457 U.S. at 819, 102 S.Ct. at 2739, the objective/subjective scenario was unworkable in many cases because "(j)udicial inquiry into subjective motivation (could) entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues (which could be) peculiarly disruptive of effective goverment." Id. at 818, 102 S.Ct. at 2738. Rather than subject an official to such disruptive effects, it was adjudged by the United States Supreme Court in Harlow,

> that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See Procunier v. Navarette, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); Wood v. Strickland, supra, 420 U.S. at 321, 95 S.Ct. at 1000

Id. (footnote omitted).

(10) The change that Harlow brought to the law does not convince this court that Judge McNagny's decision with respect to qualified immunity in this case was incorrect. To the contrary, while Judge McNagny may have spoken in terms of the then prevailing subjective/objective analysis, his ultimate holding vis-a-vis defendant Sendak's liability appears to be drafted in terms of that defendant's objective knowledge. As stated in Judge McNagny's December 16, 1980 order:

Thus, the Attorney General acted

beyond and outside of the law in not accepting the contract in issue and should have realized that he was not doing so. In fact, the defendant in this case had no authority to exercise his discretion in the first place. "He has a mandatory duty to approve all contracts which are lawful as to form and content."

502 F.Supp. at 1323, quoting Citizens Energy Coalition, 594 F.2d 1158, 1162 (7th Cir. 1979). Thus, it appears clear from Judge McNagny's December 16, 1980 prder that the defendant objectively knew that his action was outside his authority and was therefore -- by objective standards -- beyond his authority as Attorney General. Given such a conclusion, there remains as a sole safeguard defendant's claimed Eleventh Amendment immunity to the award of damage.

(11-13) With respect to the Eleventh Amendment, defendant claims that an award

of damages would impose a liability which must be paid from public funds in the state treasury and thereby violate the Eleventh Amendment as explicated in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and Quern v. Jordon, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Defendant is correct insofar as Edelman, reiterates the proscriptions of the Eleventh Amendment. As explained by the Supreme Court: "In a §1983 action ... a federal court's remedial power consistent with the Eleventh Amendment is necessarily limited to prospective injunctive relief, Ex Parte Young (209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)), (citation omitted), and may not include a retroactive award which requires the payment of funds from the state treasury, Ford Motor Co. v. Department of Treasury, (citation omitted)." 415 U.S. at 677, 94 S.Ct. at 1362.[7] And the Eleventh

7. Indiana has specifically rejected any waiver of this Eleventh Amendment protection. See I.C. 34-4-6.7-3.

Amendment may serve as a bar even though the state is not specifically named as a party because "(i)ts applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" Scheuer v. Rhodes, 416 U.S. 232, 239, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974), citing Ex Parte New York 256 U.S. 490, 500, 41 S.Ct. 588, 590, 65 L.Ed. 1057 (1921). Thus "when the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

In reliance upon the above stated proposition, defendant argues that because of the Eleventh Amendment prohibition, relief can only be in the form of a prospective injunction and that therefore, plaintiff's

section 1983 remedy has already been granted in the nature of declaratory relief. This argument, however, is unpersuasive for it misinterprets the import of the litigation presently prending before this court.

(14,15) It is altogether clear that in this action plaintiff seeks damages against defendant in his person, not against the office of the Attorney General. Moreover, Judge McNagny has already found "that the defendant, Theodore Sendak, is liable to the plaintiff for a violation of its constitutional rights." Mother Goose Nursery Schools,, 502 F.Supp. at 1326. Essentially, the issue of individual liability has been ruled upon and it is clear that damages, in some circumstances against state officials in their individual capacity, is an appropriate remedy for violations under 42 U.S.C. § 1983. In Sheuer v. Rhodes, the United States Supreme Court

though recognizing the doctrine of Ex Parte Young, reversed the dismissal of claims against the defendant-governor on Eleventh Amendment grounds, stating:

> Ex parte Young, like Sterling v. Constantin, 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932), involved a question of the federal court's injunctive power, not, as here, a claim for monetary damages. While it is clear that the doctrine of Ex parte Young is no aid to a plaintiff seeking damages from the public treasury , Edelman v. Jordan, supra; Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 537, 66 S.Ct. 745, 90 L.Ed. 862 (1946); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944), damages against

individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. Myers v. Anderson, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915). See generally Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

Scheuer, 416 U.S. at 237-238, 94 S.Ct. at 1687 (emphasis added). The Supreme Court went on to note that "(i)n some situations a damage remedy cna be as effective as redress for the infringement of a constitutional right as injunctive relief might be in another." Id. This court, by order of December 16, 1980, has already found that just such circumstances exist here. As stated by Judge McNagny:

> The plaintiff's rights to contract and due process rights were violated

by the defendant in this case. As a result of these violations the plaintiff has been forced to suffer harm which can only be remedied by remuneration.

Mother Goose, 502 F. Supp. at 1326 (emphasis added). See also Scott v. Plante, 641 F.2d 117, 133 (3d Cir. 1981); Wong v. Calvin, 87 F.R.D. 145 (N.D.Fla. 1980). On the basis of the foregoing, this court is of the view that the Eleventh Amendment does not bar an award of monetary damages in the present matter. Consequently, the court must now assess damages.

IV

The seminal case with respect to the award of damages for violation of constitutional rights is, of course, the United States Supreme Court decision in Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In Carey, elementary

and secondary students brought suit against a school board claiming that they had been suspended from school without procedural due process because they were not provided an opportunity to be heard prior to the suspension. The district court found that the students' rights had been violated, but disallowed an award of damages. The Seventh Circuit Court of Appeals reversed, indicating that if liability for the violation of a constitutional right is established, "(t)he amount fixed by the District Court should be neither so small as to trivialize the right nor so large as to provide a windfall." Piphus v. Carey, 545 F.2d 30, 32 (7th Cir. 1976). The Supreme Court granted certiorari "to consider whether in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'non punitive' damages."

Carey, 435 U.S. at 253, 98 S.Ct. at 1047. In deciding the issue presented, the Supreme Court indicated that, like the common law rules of damages, three types of damages are possible for deprivations of constitutional rights -- nominal, compensatory and punitive. As stated by the Court:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes that importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exem-

plary or punitive damages, to deter or punish malicious deprivations or rights. Id. at 266, 98 S.Ct. at 1053-54.

In the present matter, both parties recognize the possibility of these three types of damages. Quite understandably, defendant suggests that only nominal damages should be allowed because there exists no element of bad faith. Plaintiff, on the other hand, asserts that because actual injury is quantifiable, substantial damages should be assessed.

(16-18) This court is of the view that nominal damages are not appropriate in the case at bar. In reaching this conclusion, the court is guided by the following considerations. Nominal damages as recognized in Carey are applicable where a procedural due process right has been violated and there exists no showing of actual injury. See Owen v. Lash, 682 F.2d 648 (7th Cir. 1982). Here plaintiff com-

plains of actual injury. Moreover, Judge McNagny already found defendant's action violated plaintiff's right to contract and that only remuneration would compensate that loss. Further, the fact that compensatory damages may be appropriate for violations of a substantive consititutional right even absent a showing of actual injury only adds to the conclusion that present plaintiff is entitled to more than nominal damages. See Owen v. Lash, supra at 657-58.[8] Having concluded that nominal damages would minimize the nature of the deprivation, this court must focus upon compensating plaintiff for the injury incurred.

(19,20) To place the assessment of

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8. As noted by the Seventh Circuit in Owen, supra, the question of whether or not more than nominal damages is appropriate upon the showing of a substantive violation, absent actual injury, is a question which has yet to be addressed in this Circuit See Owen, supra, at 657-659. Since the present matter involves a showing of actual injuries, that question need not be resolved.

damages in the proper perspective, this court is guided by the principle espoused in Carey, supra, that the common law tort rules of damages should guide the court in fashioning the damage award to compensate for constitutional torts. Carey, supra, 435 U.S. at 257-58, 98 S.Ct. at 1049. Concomitantly, this court recognizes that federal law, rather than state law, governs such an award of damages. See Busche v. Burkee, 649 F.2d 509, 518 (7th Cir. 1981). These principles, taken together, allow this court to draw upon federal law and the common law of the several states to fashion a remedy that is responsive to the injury. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

(21) In the case at bar, this court has concluded that defendant's wronful conduct interfered with plaintiff's contract,

or, at the very least, its expected contract with the Indiana State Department of Public Welfare. Defendant emphasized that without his approval, the contract was not enforceable and thus plaintiff is, at best, seeking to recover for its expectation of receiving the subject contract. This distinction in the court's view, however, is of no great moment. It is undisputable that, as a general moment. It is indisputable that, as a general proposition, the wrongdul interference with the performance of the formation of a contract constitutes a tort for which damages may be recoverable. See 86 C.J.S. Torts § 43 (1954). "In addition, the common law has long held that the reasonable expectancy of a prospective contract is a property right to be protected from wrongful interference in the same sense as an existing contract is protected." Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d

952, 955 (5th Cir. 1975) (Texas law); accord Squirt Co. v. Seven-Up Co., 628 F.2d 1086 (8th Cir. 1980) (Missouri law); Doft & Co., Inc. v. Home Federal Savings & Loan Ass'n., 592 F.2d 1361 (5th Cir. 1979) (Florida law). See also Restatement (Second) of Torts §§ 766, 766B; but see William L. Deckelbaum Co. v. Equitable Life Assurance Society of the United States, 419 N.E.2d 228 (Ind.App. 1981).

(22) It is altogether clear that present plaintiff had an abundantly reasonable expectation of a contract with the Indiana State Department of Public Welfare. Plaintiff had entered into consecutive contracts in earlier years with that department. All had been routinely approved by the defendant and performed by the Department of Public Welfare. Further, it is clear that a time lag between submission and approval was both inevitable and expected. In short, this is not a case where the parties had

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only begun tentative negotiations; both parties to the contract (plaintiff and the Welfare Department) had agreed to the terms and signed the contract. It was entirely reasonable that both were expecting -- as in the past -- another routine approval by defendant Sendak.

Because it was entirely reasonable for plaintiff to perform as if the contract was in effect, the court is of the view that certain damages are in order. At the September 29, 1981 hearing, plaintiff presented evidence of various types of damages, including: (1) losses for services rendered; (2) interest paid on loans; (3) expected profits for contract year 1978-1979); (4) expected profit losses for future years; (5) losses incurred on a subordinate contract; and (6) general damages which cannot be computed.

(23) Generally speaking, a court should "hold the tortfeasor responsible

for all the consequences growing out of his wrongful act." Wade v. Culp, 107 Ind. App. 503, 23 N.E.2d 615, 619-20 (1939). "In such cases the measure of damages is the loss actually incurred." Id.; see also Jay Clutter Custom Digging v. English, 181 Ind.App. 603, 393 N.E.2d 230 (1979). Based upon the foregoing principle, the court is of the view that plaintiff is entitled to damages for the amount is expended for services actually rendered as well as damages to compensate for the lost profits for contract year 1978-1979. The court is further of the view, however, that plaintiff's other claims for damages should not be allowed.

(24,25) With respect to the amount actually expended by plaintiff, it was made indisputably clear at the hearing on damages that plaintiff expended $20,715.00 -- from July through some time in September of 1978 -- with the exception that, as be-

fore, the contract would be renewed. (Transcript on Damages, pp. 16-18). That is, having had several years of dealing with these types of contracts and recognizing that the contracts were always late in cominb back from the Attorney General, plaintiff (even though it had no approved contract) provided the services requires under the contract and expected to be reimbursed when defendant approved it. The undisputed testimony of Anthony Cifaldi made clear that vouchers were submitted in the amount of $20,715.00 for services rendered but were never paid by the state and remain unpaid to date. (See Transcript on Damages, p. 11). Thus, though plaintiff had billed $20,715.00 for services to Title XX contract children, it was never reimbursed for those service. Accordingly, it is clear that plaintiff should recover

from defendant for those expenses.[9]

Plaintiff shall also recover its expected profits for contract year 1978-1979. This is so because "lost profits can ... be a proper measure of damages for breach of contract." Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 455 (2d Cir. 1977). As was stated in Standard Machinery Co. v. Duncan Shaw Corp., 208 F.2d 61, 64 (1st Cir. 1953);

"Certainly no authority need be cited

9. As a correlative to the notion that a tortfeasor is responsible for "all losses incurred" is the fundamental requirement that the aggrieved party mitigate the damages Wolf-Lillie v. Kenosha County Sheriff, 504 F.Supp. 1, 9 (E.D. Wisc. 1980). In light of this, defendant lays great emphasis upon the fact that plaintiff never resubmitted the contract after Cifaldi resigned his position in plaintiff's management. However, plaintiff did advise both the Administrator of Public Welfare and the defendant that Cifaldi's resignation had been accepted by plaintiff's Board of Directors. Even given such notification, plaintiff was never thereafter requested to make further submission nor was it informed of any reason for the non-approval of the contract after Cifaldi's resignation. In this court's view, plaintiff was not required to do more than it did in an effort to mitigate damages for in point of fact it appears that nothing more could, or should have been done.

for the broad proposition that prospective profits, if provied, are an element of a plaintiff's damages for breach of contract, or for the further proposition that evidence of past profits from an established business provides a reasonable basis for estimating future profits from the business."

See also Perma Research & Development Co. v. Singer, 402 F.Supp. 881, 898 (S.D.N.Y. 1975) Aff'd, 542 F.2d 111 (2d Cir. 1976).

In the present matter, plaintiff clearly provied that it lost profits for contract year 1978-1979. In this vein, plaintiff asserts that it could be assured of a profit for Title XX (state contract students) which could not be assured of if the places were not filled by non-contract students. As was established at the damages hearing, plaintiff operated two nursery schools, one of which was located in Gary, the other in Portage, both of which had, under law, a

maximum of forty students. It was further established that students who paid their own weekly rate paid a sum of Thirty Dollars ($30.00) per week for day care services exclusive of transportation. The deal struck with the state, however, was slightly higher. For each contract student, the state agreed to pay $7.05 per day or $35.25 a week exclusive of transportation costs. Thus under the contract plaintiff expected an additional $1.05 daily for each Title XX child in its schools. Since plaintiff had forty-one contract studuents enrolled at the start of shool year 1978-79 and since the 1978-79 school year consisted of 175 days (after substracting the forty-three days contained in the vouchers referred to above), plaintiff is entitled to lost profits amounting to $7,533,75 for that year ($1.05 X 41=$43.04 X 175 = $7,533.75).

(26) Plaintiff's other claims for

accrue because it presupposed that the contract would be renewed. Given the facts of this case, that is not a supposition the court will entertain because, defendant, no less than this court, or indeed plaintiff, would not know what would, or could happen in future years.

Similarly the court will deny plaintiff's claims for damages allegedly resulting from interest paid on loans to cover unreimbursed expenses and plaintiff's claim it lost money on a subordinate contract because of defendant's malfeasance. Plaintiff wholly failed to establish that it did in fact suffer additional damages with respect to those claims. As for the loans, Anthony Cifaldi, at the hearing on damages, testified as follows:

Q. As far as the loans were concerned, the loans were to make up for the $20,000 you didn't get from the State?

A. Yes, basically speaking.

Q. So one replaced the other?

A. I would say so.

Q. You get $20,000 from the State, you don't need $20,000 in loans?

A. I would say so.

Q. When and if you ever got $20,000 from the State, you could use that to repay the loans and wash out that obligation?

A. Yes.

(Hearing on Damages, p. 44). Thus, by Anthony Cifaldi's own testimony, the loans were in lieu of the unpaid vouchers and were not above and beyond the amount expended.

Similarly, with respect to the subordinate contract, which was in the form of a five year lease between Anthony Cifaldi and plaintiff, Anthony Cifaldi testified as follows:

Q. So it is true, is it not, that the only actual money that the corporation is out as a result of that contract not being signed is underpayment of $20,715 from the State?

A. Well, I wouldn't look at it that way, I see incurred rentals, incurred wages.

Q. The corporation was obligated to pay its rent for five years, right

A. Correct.

Q. It had nothing to do with your contract with the State, did it?

A. Not directly.

(Hearing on Damages, p. 45). As the above testimony makes clear, the lease was an obligation which accrued whether or not the contract was approved.[10] That is, whether or not a contract with the state existed, the lease was an obligation which plaintiff had undertaken. In this respect, the claim for losses on the subordinate lease is not

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10. Moreoever, it should be noted that the awarded sum of $20,715.00, inasmuch as it purports to cover the vouchers submitted to the state for unpaid services constitutes, and reimburses for, the cost of providing care to Title XX students. That is, the vouchers covered the costs expended as well as the profits expected in this respect fully compensates plaintiff for its cost of doing business during the period from July through September. The interest on loans and lease payments are but two items encompassed with the cost of doing busines

unlike the claim for lost profits for future years, since plaintiff, after entering into the five year lease, could only suppose that the contract with the state would be renewed annually and that money for Title XX students would be available to fund the lease payments. Against, such a belief is found upon speculation and thus not an element of provable damages.

(27) Finally, the court will deny plaintiff's claim for general damages which, as plaintiff admits, are not susceptible to precise calculation. Most important in this regard is plaintiff's claim that it was defamed and lost money because of defendant's revelations about Anthony Cifaldi's unfortunate past. Without reaching the question as to whether plaintiff established a cause of action for defamation and/or liable,[11] it is clear that

---

11. Rather, in most cases, the question of defamation, and/or libel, vis-a-vis a due process right, revolves around the question, and in

plaintiff established no claim for damages on this score. To the contrary, Anthony Cifaldi, on direct examination, could not point to any loss because of the adverse publicity:

> Q. Was there any publicity that was generated as a result of denial of the contract through any news media?
>
> A. Yes, especially with WJOB.
>
> Q. Did that publicity have an impact on the school?
>
> A. I believe it did. I believe it did, because it inferred it was a front organization for something other than a school. It inferred

11. doing so, merely denies the allegation, e.g. Seal v. Pryor, 670 F.2d 96, 99 (8th Cir. 1982) or goes on to attempt to prove the falsity of such an allegation. See e.g. Ledford v. Delancey, 612 F.2d 883, 886-7 (4th Cir. 1980) (mere allegation of falsity apparently sufficient); Smith v. Lehman, 689 F.2d 342, 346 (2d Cir. 1982), cert. denied, 459 U.S. 1173, 103 S.Ct. 820, 74 L.Ed.2d 1018 (1983). Here, unlike any such cases, plaintiff has never even intimated that the allegation that Anthony Cifaldi did not properly submit his tax returns was false. See Colaizzi v. Walker, 655 F.2d 828, 831-32 (7th Cir. 1981). Thus, one might conclude that the alleged libel is not actionable.

and actually said it was a sole ownership by Anthony Cifaldi, a convicted felon. I don't think during that time that Jack the Ripper had as much publicity as I did.

Q. Did you, to your knowledge, lose a single student by virtue of that publicity?

A. No, I can't cite any case.

Q. Did you encounter anybody at any other location who told you they would not place a child at that school by virtue of the adverse publicity?

A. No, I can't recall that, either. The only thing I can recall at this point was the WJOR talk show concerning Mother Goose. I think it centered around, "Would you send your child to a school run by a convicted felon", and the responses were negative and positive, some of the former parents came through, that is the only thing I could gather. I mean, it seems to me like it was a lot of trouble to go through.

Q. Did any employee quit as a result of the publicity?

A. Not that I know of, no.

(Hearing on Damages, pp. 31-32). As the foregoing excerpt makes clear, plaintiff could not establish that any bad publicity

impacted upon its school and accordingly, there is a dearth of evidence that defendant is responsible for damages in defaming or libeling plaintiff.

Taken in balance, the court is of the view that the damages attributable to defendant's conduct should necessarily be limited to the damages arising during the interim period between the time of submission (July 1978) of the contract and the time of non-approval (September 1978) during which plaintiff performed unreimbursed services for which no moneys were ever paid and lost profits for contract year 1978-79. That amount, $28,248.75 ($20,715.00 + $7,533.75) is based upon the court's belief that this sum adequately redresses the plaintiff for the violation of its constitutional rights after having considered the nature of the interests involved and the facts of the case.

(2[illegible]9) To the award of $28,248.75

compensatory damages will be added prejudgment interest from the date it accrued until the date of entry of this order. The rate of interest will be calculated in accordance with the provisions of 28 U.S.C. § 1961 as presently enacted.[12]

(30,31) The award of prejudgment interest is within the discretion of the court and based upon traditional equitable principles. Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982); American Timber & Trading Co. v. First National Bank of Oregon, 690 F.2d 781 (9th Cir. 1982). The underlying purpose of awarding interest on compensatory damages is to make the wronged party whole by compensating the wronged person for being deprived of the monetary loss, i.e., the money

12. While 28 U.S.C. § 1961 is silent on the issue, it does not bar an award of prejudgment interest. Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982) and cases cited therein; see also Rodgers v. United States, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947)

and the use of the money. Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983); American Timber; United States v. California State Board of Equalization, 650 F.2d 1127 (9th Cir. 1981), aff'd mem., 456 U.S. 985, 102 S.Ct. 2261, 72 L.Ed.2d 864 (1982).

V.

(32,33) Plaintiff seeks an award of attorney's fees if successful. Section 1988 of Title 42 of the United States Code so provides.[13] The court finds that costs and attorney's fees should be assessed against the defendant in this action. The considerations relevant to computing a reasonable attorney's fee award have been set forth by the United States Court of Appeals

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13. Section 1988 provides, in pertinent part: In any action or proceeding to enforce a provision of sections 1981, 1983, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

for the Seventh Circuit in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976). The time spent by the attorney is not to be simply multiplied by a billing rate. The primary factors in the computation include not only the time reasonably spent on the case, but also the value of the attorney's work, given local legal fees, and his abilities, reputation and degree of success in the case. Also relevant is whether the attorney's efforts in this case precluded him from working on other legal matters. These factors are drawn from the sections of the Code of Professional Responsibility that describe how an attorney should determine the fee he may properly charge a client, particularly D.R. 2-106.

While plaintiff's request for an award of attorney's fees will be granted, the court cannot at this time, on the showing

before it, compute the proper amount of such an award. Plaintiff will therefore be directed to file not later than twenty (20) days from the date of this judgment a more complete breakdown and explanation of charges and time and such other material supporting the request for attorney's fees as is required by Waters v. Wisconsin Steel Works. The amount of such an award will be set by further order of the court. A copy of plaintiff's showing relating to attorney's fees shall be served on defendant, and defendant shall have ten (10) days from the date of filing to respond or otherwise challenge the showings and fees set forth.

Conclusion

On the basis of the foregoing, this court finds that defendant is liable to plaintiff for the deprivation of its constitutional rights which can only be remedied by remuneration. Accordingly, it is ORDERED that the defendant pay the plaintiff

the sum of Twenty Eight Thousand Two Hundred Forty-Eight Dollars and Seventy five Cents ($28,845.75) together with prejudgment interest.

It is FURTHER ORDERED that plaintiff recover of and from the defendant attorney's fees in an amount to be set by further order of the court. Plaintiff is directed to file a more complete and explanatory statement of charges and an affidavit of counsel in support of its request for attorney's fees in a manner consistent with that set out in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976), not later than twenty (20) days from the date of this judgment. A copy of plaintiff's showing relating to attorney's fees shall be served on defendant, and defendant shall have ten (10) days from the date of filing to respond or otherwise challenge the showing and fees set forth.

No. 85-918

Supreme Court, U.S.
FILED
DEC 28 19[illegible]
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

MOTHER GOOSE NURSERY SCHOOLS, INC.,
an Indiana Not-For-Profit Corporation

Petitioner

-v.-

THEODORE L. SENDAK, Individually and as
Attorney General of the State of Indiana

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

DAVID MICHAEL WALLMAN
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6314

Attorneys for Respondent

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Central Publishing Company, Inc., Indianapolis, IN 46206

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QUESTION PRESENTED

Whether the Attorney General of the State of Indiana should be immune from personal damages in federal court for exercising state statutory duties imposed upon him to review state contracts, and denying a public contract to a twice convicted income evader serving a probationary sentence at the time of contract submission.

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MOTHER GOOSE NURSERY SCHOOLS, INC.,
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-v.-

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Attorney General of the State of Indiana

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Theodore L. Sendak, the former Attorney General of the State of Indiana, respectfully prays this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), thereby refusing to review the decision entered August 14, 1985 in *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Indiana General Assembly has posited contract review with the Indiana Attorney General since at least 1947. IC 4-13-2-14 reads in pertinent part:

> All contracts and leases shall be approved as to form and legality by the attorney general. The attorney general or a deputy designated by him shall approve any contract or lease submitted to him under this chapter unless he finds that it does not meet the conditions of this chapter and shall detail in writing to the administrative body or chief executive officer of the agency or department involved the specific respects in which the proposed agreement fails to meet the requirements of law.

Regulations having the force and effect of statutory law have been enacted in regard to the licensing and operation of day care centers. Ind. Admin. Code (17-3-2-12)-B8, currently codified at 470 IAC 3-4-11 (1984), provides in pertinent part:

> (a) Each member of the staff [of an approved provider] shall be a competent and reliable person of good moral character and reputation who is mentally, physically and emotionally able to assume assigned responsibility for group care of children, or for the operation and maintenance of the child-care institution.

STATEMENT OF THE CASE

Anthony J. Cifaldi was, at the time of the incidents pertinent to this case, the owner and chief operating officer of Mother Goose Nursery Schools Incorporated (hereafter Mother Goose). Mother Goose had received annual state contracts for the provision of day care services to eligible children. Attorney General Sendak refused to approve the contract for state fiscal year 1979 (July 1, 1978 to June 30, 1979) when he discovered that Cifaldi had been twice

convicted of income tax evasion and was serving a probationary sentence at the time of contract submission. Pursuant to IC 4-13-2-14, Attorney General Sendak communicated his rejection of the contract to Governor Bowen by letter dated September 26, 1978. The rejection was based on failure of Anthony Cifaldi to be a "competent and reliable person of good moral character and reputation" as required by Ind. Admin. Code (17-3-2-12)-B8.

As a result of this rejection, Petitioner commenced this litigation. At no time did Petitioner seek redress under the numerous remedies available under state law, see *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 at 674 to 675, (7th Cir. 1985). At the time of the contract rejection, there was no case law construction of the Attorney General's contract review obligations under IC 4-13-2-14 by a state or federal court of record.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

The Indiana Attorney General's Responsibilities in Reviewing State Contracts Meets the *Mitchell v. Forsyth* Test for the Award of Immunity

The true essence of Petitioner's claim is that the Seventh Circuit misapplied this Court's decision on *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985). *Mitchell* establishes, if not reaffirms, a three (3) part test for the application of absolute or quasi-judicial immunity. The Seventh Circuit carefully applied both *Mitchell* and *Butz v. Economou*, 438 U.S. 478 (1978):

> There are, of course, some obvious differences between the role of the Attorney General as prosecutor and the Indiana Attorney General's role in reviewing proposed contracts with the state for correct "form and legality." But the similarities between the two are sufficient to make them analogous for immunity

> purposes. In both instances the state has vested the Attorney General with the responsibility to review the facts of a given case- in one, allegedly criminal conduct, and in the other, a proposed contractual relationship- and determine whether the conduct is legal. Both decisions require that the Attorney General use his legal expertise and practical experience to determine whether the proposed conduct is in accordance with the law. In fact, in the contract review area, the Attorney General's conduct is even more "judicial" than in the Attorney General's role as prosecutor. As prosecutor, he is vested with broad discretion to bring a suit, which discretion is seldom questioned by the court, especially if the Attorney General decides not to pursue the case further. Moreover, as a prosecutor, the Attorney General in a sense is merely initiating the formal judicial process. In his role as contract reviewer, he has no discretion in determining what cases are considered formally, much as a judge has little control over which cases are prosecuted. Moreover, rather than starting the prosecution, the Attorney General is vested with "ultimate" decision on legality.
>
> *Mother Goose*, *supra* 770 F.2d at 673.

In addition, the Seventh Circuit correctly determined that reviewing contracts for "form and legality" was far from a woodenly ministerial act, *Mother Goose*, *supra* 770 F.2d at 674.

A fair reading of *Mitchell* demonstrates that the key failure of Attorney General Mitchell in maintaining immunity for his somewhat nebulous theory of "national security" was the lack of safeguards or checks on his action, *Mitchell*, 105 S.Ct. at 2814. As the Seventh Circuit determined in the case at bar, state judicial remedies abound, *Mother Goose*, 770 F.2d at 674 to 675.

This Court's opinion in *Mitchell* cannot logically be read to modify the test for immunity repeated by this Court in *Butz* and applied throughout the federal judiciary, a

position tacitly acknowledged by the Seventh Circuit in the instant case.[1]

The Seventh Circuit's determination that contract review under Indiana state law properly met all tests for quasi-judicial immunity established by this Court and developed throughout the federal judiciary.

II.

This Court's Recent Decision in *Cleavinger v. Saxner* Does Not Change Existing Precedent on Immunity or, More Importantly, the Seventh Circuit's Decision in This Case

This Court's decision in *Cleavinger v. Saxner*, ____ U.S. ____, no. 84-732, issued December 10, 1985, cannot fairly be read to change the standard tests for granting or denying immunity to governmental officials. All *Cleavinger* did in reality was to apply existing tests to in-house correctional personnel serving on part time ad hoc discipline committees.

The distinguishing features between *Cleavinger* and the instant case are readily apparent; Attorney General contract review does not involve disposition by unsophisticated staff passing on persons or entities personally known to the Attorney General. Neither, as the Seventh Circuit found, are remedies non-existent or meaningless. See *Mother Goose*, 770 F.2d at 674 to 675.

To equate a state elected official's statutory obligations to apply the existing body of contract law to a specific

---

[1]In addition to the numerous case citations relied upon by the Seventh Circuit for the immunity proposition, Respondent would highlight *Citizens Energy Coalition v. Sendak*, 594 F.2d 1158 at 1162 (7th Cir. 1979), where the Seventh Circuit found Attorney General contract review to be quasi-judicial. This Court denied certiorari, *Sendak v. Citizens Energy Coalition*, 444 U.S. 842, 100 S.Ct. 83 (1979).

proposed contract with prison employees' marginal efforts to discipline inmates personally known to them is both unnecessary under existing case law, including *Cleavinger*, and uncalled for on the facts of this case.[2]

In any event, *Cleavinger* distilled and applied the set of factors for absolute immunity established in *Butz, supra.* Stated succinctly, there is an obvious need for the Attorney General to perform contract review without harrasment or intimidation; state law judicial remedies abound for the correction of errors and the award of damages; and, perhaps most importantly, positing public contract approval with some state official, in this case the Attorney General, is about the only viable means to avoid undue political influence in an area chronically susceptible to the worst traditions of Tammany Hall.

Cleavinger does not change the result reached by the Seventh Circuit in the case at bar.

III.

Petitioner Presents at Best an Academic Issue not Warranting Review by This Court Since It is Apparent that Even a Qualified Immunity Shields Respondent and Prohibits Recovery by Petitioner.

Petitioner' s effort to style this case as some vitally important and incorrect extension of quasi-judicial immunity tacitly assumes that he can recover if he defeats the immunity granted by the Seventh Circuit. This position is simply incorrect.

The *only* reported case from any court construing the Indiana Attorney General's contract review authority,

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[2]For whatever reasons, the petitioners in *Cleavinger* did not appeal the finding that they violated "clearly established law" under the test established in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). As more fully developed in the following argument, Respondent in the instant case contends simply that he is immune under the terms of any available test.

Citizen's Energy Coalition of Indiana v. Sendak, 457 F.Supp. 248 (S.D.Ind. 1978), came down some three (3) weeks *after* Respondent Sendak communicated his rejection of Petitioner's contract to Governor Bowen. The District Court's opinion of first impression was appealed to the Seventh Circuit with a determination rendered some six (6) months after contract rejection, *Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158 (7th Cir. 1979).

This Court has held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known", *Harlow v. Fitzgerald*, 457 U.S. 800 at 819, 102 S.Ct. 2727 at 2738 (1982). To hold Respondent personally liable in damages, as the District Court did in the instant case, for rejecting the contract is to hold the Respondent responsible for failing to predict a federal court's initial construction of an unconstrued state statute.[3]

Since a proper application of *Harlow* and its progeny, *Davis v. Scherer*, ___ U.S. ___, 104 S.Ct. 3012 (1984), for example, results in no recovery by Petitioner, consideration by this Court of the type of immunity to be granted presents an academic exercise only.

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[3]The questions of pre- or post-deprivation administrative remedies and the correctness of rejecting the contract were not considered by the Seventh Circuit since Petitioner did not appeal the denial of injunctive relief, *Mother Goose v. Sendak*, 770 F.2d at 674, fn. 5, and 675, fn. 6. Neither does Petitioner raise them here.

CONCLUSION

For the foregoing reasons, Respondent, former Indiana Attorney General Sendak, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

David Michael Wallman
Deputy Attorney General